

Supreme Court, U. S.
FILED

MAY 30 1978

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77.....**77-1704**

MARJORIE LEHMAN,

Petitioner,

—v.—

LYCOMING COUNTY CHILDREN'S SERVICES, *et al.*,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA**

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
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The Petitioner, Marjorie Lehman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania, Eastern District, entered on January 31, 1978, which affirmed, with two justices dissenting, an order of the Pennsylvania Court of Common Pleas, Orphans' Court Division, entered on June 3, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, Eastern District, and the two dissenting opinions are reported at 383 A.2d

1228, sub nom., In re William L. The majority and two dissenting opinions are set out in the Appendix, infra, pp. 1a-67a. The findings, Discussion and Order of the Orphans' Court are unreported and are set forth in the Appendix, infra, pp. 68a-73a.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on January 31, 1978. On April 21, 1978, Mr. Justice Brennan entered an order extending the time to file this petition for certiorari to and including May 31, 1978. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1257(3).

QUESTIONS PRESENTED

I

WHETHER THE DUE PROCESS CLAUSE PERMITS A STATE TO TERMINATE PARENTAL RIGHTS INVOLUNTARILY IN THE ABSENCE OF PAST, PRESENT OR LIKELIHOOD OF FUTURE SERIOUS HARM TO CHILDREN, SOLELY BECAUSE OF THE PARENT'S INTELLECTUAL LIMITATIONS AND THE AVAILABILITY OF A "MORE STIMULATING ENVIRONMENT" ELSEWHERE.

II

WHETHER THE PENNSYLVANIA TERMINATION STANDARD OF PARENTAL "INCAPACITY ... [WHICH] HAS CAUSED THE CHILD TO BE WITHOUT ESSENTIAL CARE, CONTROL OR SUBSISTENCE NECESSARY FOR HIS PHYSICAL OR MENTAL WELL-BEING" [P.S. §311(2)]

IS VOID FOR VAGUENESS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

III

WHETHER THE FOURTEENTH AMENDMENT PERMITS PERMANENT TERMINATION OF THE PARENTAL RIGHTS OF A FAULTLESS BUT "INCAPACITATED" PARENT WHEN LESS DRASTIC ALTERNATIVES FOR THE CARE AND PROTECTION OF THE CHILDREN ARE AVAILABLE.

STATUTE INVOLVED

1 Pennsylvania Statutes, §311(2) (Supp. 1977) provides:

The rights of a parent in regard to a child may be terminated after a petition filed pursuant to Section 312 and a hearing held pursuant to Section 313, on the ground that: . . .

- (2) the repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent.

STATEMENT OF THE CASE

On June 3, 1976, the Lycoming County Orphans' Court entered an order involuntarily terminating petitioner's parental rights to her three sons pursuant to 1 P.S. §311(2). The order was pursuant to hearings held on May 4th and 7th, 1976. At the hearings it was shown that in June, 1971, petitioner (alternatively referred to as "the mother"), then a 39-year-old woman, was living with her three sons, then ages 7, 5, and 1, and was about to give birth to her last child. She was supported by social security, public assistance grants and food stamps. Because she had nobody to care for the boys during her confinement and because her living quarters were roach-infested, she sought the aid of Lycoming County Children's Services (hereafter "the agency") for temporary foster care of the boys.

Until that time, petitioner's sons had been under her exclusive and continuous care and supervision. No report or adjudication of parental neglect had ever been made or entered against her and there is no suggestion in the record that her sons had ever been improperly cared for or mistreated while they were in her custody.

After petitioner gave birth to her daughter, Tracie, the agency offered her a small apartment suitable only for her and her new baby. After some hesitation the mother accepted, fully expecting larger quarters imminently so that she could be reunited with her sons. A schedule of one-hour monthly visits

with them in the agency's office was arranged, which the mother never missed.

Although the agency had authority to return the boys at any time, it made no effort to reunite the family "because of her [the mother's] limited abilities . . . we did not feel she was capable of taking care of four children." (Orphans' Court Transcript, p.15.) Only after the mother obtained legal assistance did she obtain a court decree in December, 1975, increasing the visits to bi-weekly and allowing the visits to take place in her own home for several hours each time. Three months later the agency filed the petition to terminate parental rights to the boys, but not to Tracie.

Tracie, the youngest child, has been in her mother's care since birth. It is uncontradicted that she is healthy and normal and that her mother is affectionate and attentive. The mother's home is always neat and orderly and she has been cooperative with nutrition aids provided since Tracie's birth, although she once did not fully comply with instructions on how to rid Tracie's hair of lice.

The mother is illiterate although she has completed the seventh grade. Intelligence tests indicate that she is in the range of the educable mentally retarded. She has had difficulty keeping track of household bills and has occasionally purchased unnecessary gifts for her children on credit.

When her sons came to her home on bi-

weekly visits, the mother prepared meals for them and entertained them. The boys played with and enjoyed each other and their sister. According to the agency's witnesses, however, the mother was unable to discipline and supervise the boys; they ran around the house and the youngest boy did not relate to her much. The mother said that the social workers' presence during the visits made her self-conscious and that she was able to supervise and control the boys better when she was alone with them.

Petitioner's sons have been in separate foster homes since their placement. The eldest, Frank, 15 years old at the hearing, has been in three different foster homes and is considered unadoptable. William, 13, has been in two homes and may be adoptable. The foster parents of Mark, age 7, do wish to adopt him. All three boys testified that they enjoyed their visits with their mother and sister and did not wish them to cease, although each stated that he did not wish to return to live in the mother's home.

On June 3, 1976, the Orphans' Court entered an order permanently severing the mother's parental rights to the three boys, thereby terminating all visitation as well. A motion for visitation pending appeal to the Pennsylvania Supreme Court was denied on October 29, 1976.

The mother is able to handle the custody of Tracie, four years old; p. 69a

The children are "healthy, active, alert youngsters." Although the mother loves her sons and wants them back and at least the two oldest return her affection, she "would not be able to provide intellectual or social stimulation for them, nor would she be able to channel and discipline their behavior;" pp.71a-72a

That by reason of "her very limited social and intellectual development combined with her five-year separation from the children, the mother is incapable of providing minimal care, control and supervision for the three children [and] her incapacity cannot and will not be remedied;" p. 72a

That "the best interests of the children" would dictate that they remain in agency custody indefinitely. p. 72a

The court made no finding that the mother had ever neglected or abused any of her children. It also ruled that section 311(2) does not offend the United States Constitution. pp. 72a-73a

On appeal to the Pennsylvania Supreme Court, the mother argued that the termination of her parental rights violated the Fourteenth Amendment because the state had no compelling interest in severing the parental relationship in the absence of an adjudication that she had ever failed to provide adequate child care in

the past or that the boys would be exposed to serious and substantial harm by her in the future. Also, she argued that the Pennsylvania standard of parental "incapacity [which] has caused the child to be without essential care, control or subsistence necessary for his physical or mental well-being" [1 P.S. § 311(2)] is impermissibly vague both on its face and as applied to her.

With two justices dissenting, the Pennsylvania Supreme Court affirmed the termination order based on "parental incapacity, which does not involve parental misconduct." p.5a. The majority held that the Legislature's power to protect the physical and emotional needs of children authorized termination in the absence of serious harm or risk of serious harm to the children and in the absence of any parental misconduct.3a-4a. It held also that the statute is not unconstitutionally vague either on its face or as here applied.

Justice Nix, dissenting, thought the termination order was unconstitutional for three reasons. First, the standard of harm to the children is too low to warrant the drastic step of involuntary termination under the Due Process Clause. Second, the standard of "parental incapacity" as applied and on its face is void for vagueness. Third, termination based upon a parent's involuntary condition or incapacity violates the Fourteenth Amendment.

Justice Manderino, also dissenting, ruled that a faultless parent, involuntarily incapacitated, cannot constitutionally be subject

to permanent termination of parental rights.

REASONS FOR GRANTING THE WRIT

I

THE INVOLUNTARY TERMINATION OF PETITIONER'S PARENTAL RIGHTS WAS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

1. Because the Pennsylvania Termination Standard Requires No Showing of Serious Harm to Children, the State Has No Compelling Interest in Destroying the Family Relationship.

Petitioner's parental rights to her three sons were permanently severed in the face of an express finding that she had adequately cared for her four-year-old daughter since the child's birth, and in the absence of any finding that she had ever neglected her three sons in the years they had been in her custody. The termination order was pursuant to a state standard which, as construed by the Pennsylvania Supreme Court, authorizes termination for parental incapacity without requiring a showing that the children had ever suffered "substantial physical or mental harm." pp.3a-5a

The Pennsylvania standard in this case was satisfied solely by the mother's "limited social and intellectual development combined with her five-year separation from the children," (p. 72a) a separation for which the state was primarily responsible. Petitioner, a demonstrably functioning parent, was thus deprived of her sons forever because a more "stimulating" environment had been found for

them; not because she ever had failed or would in the future fail to provide them with at least minimally adequate care.

The failure of the Pennsylvania termination standard to require a showing of serious harm to the children, or the imminent risk of such harm, deprives the state of a parens patriae interest compelling enough to abridge permanently a fundamental liberty that this Court has held is protected by the First, Ninth and Fourteenth Amendments. E.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Moore v. East Cleveland, 431 U.S. 494 (1977). Within the past year, this Court has twice cautioned that the family unit may not be destroyed "without some showing of unfitness and for the sole reason that to do so was in the children's best interest." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (Stewart, J., concurring); Quilloin v. Walcott, __ U.S. __, 54 L.Ed.2d 511, 520 (1978).

Termination in this case functionally rests upon the comparative "best interest" standard condemned by this Court. Despite the adjudication of petitioner's "parental incapacity," the absence of past neglect or a likelihood of future serious harm, combined with a clear demonstration of her present parental functioning, amounts to termination on constitutionally impermissible grounds -- a comparative assessment that a better environment is available elsewhere.

Petitioner does not contest the trial court's findings of fact. Rather, she challenges as constitutionally defective a state standard of "incapacity" or parental unfitness which, as applied to those facts, authorizes involuntary termination of a demonstrably functioning mother's parental rights in the absence of a sufficiently high or compelling child-protection interest. Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn., 417 F.Supp. 769 (M.D. Ala. 1976); Sims v. Texas Department of Public Welfare, 438 F.Supp. 1179 (E.D. Tex. 1977). Merely by labeling a parent "unfit" or "incapacitated" the state may not shield from constitutional scrutiny the facts to which it has applied its termination standard.¹

1. In cases arising under the Due Process Clause and the First Amendment, this Court "has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case." Jacobellis v. Ohio, 378 U.S. 184, 189 (1964) (whether material is obscene); Drope v. Missouri, 420 U.S. 162, 175 (1975) (competency to stand trial); Watts v. Indiana, 338 U.S. 49, 51 (1949) (voluntariness of confession).

2. The Pennsylvania Standard Is Void for Vagueness.²

The termination of this mother's rights under a standard of parental "incapacity ... [which] has caused the child to be without essential care, control or supervision essential to his mental or physical well-being" [1 P.S. §311(2)] is hopelessly vague on its face and as here applied. This Court has held in a variety of contexts that a statute authorizing the abridgement of a fundamental liberty must be fairly and even-handedly enforced; that it must set forth with reasonable particularity the conduct which will justify the state's action in order to deter the enforcement agency "from creating its own standards in each case." Herndon v. Lowry, 301 U.S. 242, 263; Papachristou v. City of Jacksonville, 415 U.S. 156 (1972). Here, the adjudication of "parental incapacity" of a mother who has never harmed her children in any way because she is unable to provide "intellectual and social stimulation," is precisely the subjective, value-laden, and eccentric applica-

2. Although the termination of parental rights in the absence of serious harm to children (Point 1, supra) is a function of statutory vagueness, Petitioner presents them as two separate issues inasmuch as a clear and precise statute which nonetheless authorizes termination in the absence of serious neglect would still violate Due Process.

tion that the vagueness doctrine is designed to prevent.

Moreover, insofar as petitioner's rights were severed despite her past and present provision of supervision, food, shelter and affection to her children, the statute fails to afford adequate notice -- the second vice of a vague statute. This Court has repeatedly held that due process of law requires that a statute be sufficiently clear that reasonable people seeking to conform their conduct to the state's requirements will be able to understand what is expected of them. See, e.g., Grayned v. City of Rockford, 404 U.S. 104 (1972); Palmer v. Euclid, 402 U.S. 544 (1971). Although the state's legitimate interest in protecting children may require some latitude in the formulation of a termination standard, the breadth and indeterminacy of the Pennsylvania standard is far in excess of that which is either necessary or desirable for the welfare of children.³

The majority's claim, moreover, that the statute's apparent vagueness has been elimi-

3. See, Wald, "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights," 28 Stanford L.Rev. 623 (April 1976); Mnookin, "Foster Care -- In Whose Best Interest?" Harvard Ed. Rev., Vol. 43, no. 4 (Nov. 1973) (hereafter "Mnookin").

nated by the Pennsylvania Supreme Court's own past decisions is squarely refuted by those decisions. In its three most recent opinions in which the statute here involved was considered, the Pennsylvania Supreme Court articulated termination standards wholly inconsistent with the standard applied in this case. Adoption of R.I., 361 A.2d 296 (Pa. 1976); In re Geiger, 331 A.2d 172 (Pa. 1975); In re Brandl, 339 A.2d 759 (Pa. 1975).⁴ In all

4. In Brandl, the court vacated the termination order although the parent had been criminally prosecuted for child neglect and had been committed to a state mental hospital for ten years, because of testimony that with assistance she would be able to manage in the future. In Geiger, the court also reversed a termination order against a mentally retarded and emotionally disturbed parent who provided a "submarginal" physical and emotional atmosphere because physical needs were adequately met and "because the record does not establish that the 'physical or mental well-being' of the children suffered because of such conditions." The court expressly rejected predictions of future emotional harm as a basis for termination.

Although the court affirmed the termination order in Adoption of R.I., there the child suffered from malnutrition and bleeding body sores and the court emphasized that termination may only be resorted to upon such a showing of clear necessity.

three cases the Pennsylvania Court held that a high and palpable degree of harm to children must be demonstrated for permanent termination; that parental inadequacies alone are insufficient.

3. Even If a Faultless Parent Is Permanently Incapacitated, the State Cannot Constitutionally Terminate Parental Rights If Less Drastic Alternatives Would Provide for the Children's Basic Needs.

The decision of the Pennsylvania Supreme Court authorizes permanent severance of the parental bond for "parental incapacity, which does not involve misconduct." (p. 5a) As Justice Manderino observes in dissent, this would include a parent injured in an auto accident or one who suffers a serious physical illness. In light of the fundamental and constitutionally protected nature of the parent-child relationship, in such cases the state is obliged to provide a less drastic method of caring for children than destruction of the family.

Assuming arguendo that the mother in this case is incapacitated, the state in exercise of its parens patriae interests was obliged to continue or augment in-home services that would enable her to resume custody of her sons. At the very least, the state was obliged to continue the children's foster care status so that the mother could continue her visits and maintain her relationship with her children. This was an especially compelling course in view of the children's expressed desire to

continue the visits and the relationship.

Indeed, the state has no interest, compelling or otherwise, in terminating petitioner's rights to her oldest son, Frank. Frank had been adequately cared for by his mother for the first seven years of his life. At the time of the hearing he was fifteen years old and considered to be unadoptable by the agency. Whatever interest the state has in terminating parental rights in order to secure adoptive homes for some children, at least for Frank no such interest exists.⁵

This Court has held in a variety of contexts that where the state, in pursuit of otherwise legitimate objectives, seeks to encroach upon fundamental freedoms, it must choose means "with a lesser burden on constitutionally protected activity." Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Shelton v. Tucker, 364 U.S. 479 (1960). Where the right to raise a family is at stake, this Court has imposed upon the state an especially heavy burden of employing means which minimize the intrusion upon family privacy and integrity. Cleveland Board of Education v. LaFleur,

5. For the damaging consequences to children from parental termination when there is a visible and interested parent, no matter how inadequate, see, Fanshel and Shinn, CHILDREN IN FOSTER CARE, A LONGITUDINAL STUDY (Col. U. Press, 1978).

414 U.S. 632, 647 (1974); see also, Roe v. Wade, 410 U.S. 113 (1973); Moore v. East Cleveland, 431 U.S. 494 (1977).

II

A GROWING CONFLICT AMONG JURISDICTIONS AND THE LARGE NUMBER OF CHILDREN AFFECTED REQUIRES AN EARLY DETERMINATION OF THE CONSTITUTIONAL LIMITS UPON STATES IN TERMINATING PARENTAL RIGHTS.

Until recently, state courts assiduously protected the rights of the natural or biologic family unless a high level of child neglect and parental unfitness was demonstrated.⁶ In the past three years, however, at least three state supreme courts have held that the comparative and subjective "child's best interest" standard may constitutionally defeat the rights of a non-neglecting and otherwise fit parent. In re J.S.R., 374 A.2d 860 (D.C.App. 1977); In re New England Home for Little Wanderers, 328 N.E.2d 854 (Mass. 1975). This change has been prompted by a recent but highly disputed child development theory which places paramount importance upon the desira-

6. See, e.g., People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952); In re Appeal of Rinker, 117 A.2d 780 (Pa. 1955); In re Clark's Adoption, 1 P.2d 112 (Ariz. 1931).

bility of "continuity of care."⁷ The theory is being especially invoked when dilatory state practices (see footnote 12 and accompanying text, infra) and the delays of litigation have deprived a non-neglectful parent of custody for a period of time. The Pennsylvania decision below, so radical a departure from the same court's earlier decisions, is the third state to authorize termination of family relationships on this basis. See also, Bennett v. Jeffreys, 40 N.Y.2d 543 (1977).

On the other hand, one United States Court of Appeals has recently held that despite a four-year separation between parents and children, permanent termination in the absence of a high and substantial degree of harm to children constitutes a constitutional deprivation under Section 1983 of the Civil Rights Act. Alsager v. District Court, 545 F.

7. For criticism of the "continuity of care" theory, see, e.g., Okpaku, Psychology: Impediment or Aid in Child Custody Cases? 29 Rutgers L. Rev. 1117 (1976); Book Review, Beyond the Best Interests of the Child, Strauss and Strauss, 74 Col. L. Rev. 996 (1974).

2d 1137 (8th Cir. 1976).⁸ Two state supreme courts have also ruled that federal due process standards are violated by terminations under the "child's best interest" standard. Berrien v. Greene County Department of Public Welfare, 217 S.E.2d 854 (Va. 1975); In re Walter B., 4 Family Law Reporter 2380 (Utah, March 20, 1978).

Indeed, in reliance upon the Alsager case, supra, a three-judge federal court has held that even in the case of temporary state custody not involving permanent termination, the state must show that "the child is being harmed in a real and substantial way" under neglect standards that are clear and carefully defined. Roe v. Conn, 417 F.Supp. 769 (M.D. Ala. 1976). See, to the same effect, Sims v. Texas Department of Public Welfare, 438 F.Supp. 1179 (E.D. Texas 1977) ("The State must make a clear showing that continued custody is necessary to protect the child from physical danger.")

There is an urgent need for this Court to resolve the question of whether states may

8. In Alsager, the federal appeals court thus affirmed in part a lower federal court judgment that the Iowa termination statute violated due process both for failure to require a high threshold of harm to children and because of vagueness. Alsager v. District Court, 406 F.Supp. 10 (Iowa 1975).

constitutionally terminate the rights of faultless parents under vague and de minimus standards of child welfare. Close to half a million children in this country are in foster care, exclusive of those on parole from juvenile correctional institutions.⁹ Of this half million, well over fifty percent were placed voluntarily by their parents in the absence of any adjudication of neglect, abuse or other parental misconduct.¹⁰ Virtually all of these children have impoverished parents who, like petitioner, were in exigent circumstances and had nowhere to turn but to the state for tem-

9. Statement of HEW representative John C. Young, cited in House of Representatives, Subcommittee on Select Education, Foster Care: Problems and Issues, 94th Cong. 2d Sess., Sept. 8, 1976, 533, 541 n.1; see, Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Foster Care and Adoptions: Some Key Policy Issues.

10. Mnookin, supra at 601. In New York City, 82 percent of the 30,000 children in foster care are placed voluntarily for temporary care. Audit Report on Foster Care Agencies, Office of the Comptroller of the City of New York, p. 4 (May 26, 1977).

porary care for their children.¹¹

This case is a striking example, moreover, of the pervasive failure or unwillingness of state agencies expeditiously to reunite foster children with their parents -- a failure largely attributable to highly subjective judgments of parental desirability.¹² If

11. Recent studies show that over 96 percent of the foster children in California are from AFDC families. In Massachusetts, only 1.2 percent of the natural parents of foster children have annual incomes over \$15,000. Pers, Government as Parent: Administering Foster Care in California (Institute of Governmental Studies, U.C.L.A. Berkley, 1976); Vasaly, Foster Care in Five States, U.S. Dept. HEW (Childrens Bureau, No. 76-30097).

12. Surveys recently conducted show that 40 percent of Massachusetts' foster children and 39 percent of California's foster children remain in placement at least five years. In New York City the average length of time is 4.7 years. Fanshel and Grundy, Computerized Data for Children in Foster Care (1975), reprinted in Foster Care: Problems and Issues, supra, note 7; Foster Care and Adoptions: Some Key Policy Issues, Senate Subcommittee on Children and Youth, 94th Cong., 1st Sess., p. 10 (Aug. 1, 1975).

the judgment of the Pennsylvania Supreme Court in this case is not reversed, it will serve as a signal that whenever more "stimulating" homes are available, the state may, if it causes enough time to lapse, sever the rights of faultless and otherwise adequate parents who turned to the state for what they thought would be temporary aid.¹³

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RENA K. UVILLER

BRUCE J. ENNIS

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13. There are 3,000 children in New York City alone for whom court action to terminate parental rights is pending. Fanshel and Grundy, Ibid.

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May 1978

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In re WILLIAM L., Frank L., and Mark L.,
minor children.

Appeal of MAJORIE L.

In re JUDITH DENISE B., a minor.

Appeal of GLADYS B.

Supreme Court of Pennsylvania.

Argued April 21, 1977.

Decided Jan. 31, 1978.

ROBERTS, Justice.

These are appeals from final decrees of the Orphans' Court Division of the Court of Common Pleas of Lycoming County terminating the parental rights of appellant Gladys B. to her daughter Judith Denise B. and of appellant Marjorie L. to her three sons William L., Mark L., and Frank L.¹ Appellee, in both appeals, is Lycoming County Children's Services [Children's Services]. The parental rights of both appellants were terminated pursuant to section 311(2) of the Adop-

1. We hear these appeals pursuant to the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, art. II, § 202(3), 17 P. S. § 211.202(3) (Supp.1977).

tion Act of 1970.² In addition to challenging the sufficiency of the evidence to support the decrees entered in their respective cases, both appellants claim that section 311(2) is vague, in violation of the due process clause of the fourteenth amendment. They also assert that section 311(2), as applied to them, deprives them of their interest in maintaining their parental relationships protected by the first, ninth, and fourteenth amendments of the United States Constitution. Because of the substantial similarity of these claims, we agreed to hear and decide the two cases together. We affirm in both appeals.

I. SECTION 311(2) OF THE 1970 ADOPTION ACT IS NEITHER UNCONSTITUTIONALLY VAGUE NOR VIOLATIVE OF SUBSTANTIVE DUE PROCESS AND MAY CONSTITUTIONALLY BE APPLIED TO TERMINATE APPELLANTS' PARENTAL RIGHTS.

2. Act of July 24, 1970, P.L. 620, § 311(2), 1 P.S. § 311(2) (Supp.1977). Section 311(2), for which there was no corollary provision in the previous Adoption Act, authorizes termination of parental rights when:

"The repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent."

Every presumption is in favor of the constitutionality of legislative acts, Statutory Construction Act of 1972, 1 Pa. C.S. § 1922 (3) (Supp. 1977), and statutes are to be construed whenever possible to uphold their constitutionality. Bentman v. Seventh Ward Democratic Executive Committee, 421 Pa. 188, 218 A.2d 261 (1966). "Courts may not declare a statute unconstitutional 'unless it clearly, palpably, and plainly violates the Constitution.'" Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 16, 331 A.2d 198, 205 (1975), quoting Daly v. Hemphill, 411 Pa. 263, 271, 191 A.2d 835, 840 (1963). Appellants' constitutional challenges do not meet this stringent burden.

Appellants both assert that section 311(2) of the Adoption Act is unconstitutional unless given a narrowing interpretation precluding its application to terminate their respective parental rights. They assert that parents have a fundamental interest in continued association with their children protected by the United States Constitution. They contend that section 311(2) violates this interest unless interpreted to require two showings before parental rights may be terminated: (1) that the parent has demonstrated a "high and substantial degree of misconduct;" and (2) that the child, while in the parent's custody, has suffered substantial physical or mental harm because of the absence of a basic need such as food, clothing, shelter, or medical care. Appellants contend that, absent such a narrow interpretation, the phrase "has caused the

child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being" in section 311 (2) is unconstitutionally vague because it is susceptible to arbitrary enforcement and fails to give adequate notice to parents of the conduct required of them. We do not agree. Section 311(2) is not unconstitutionally vague and may constitutionally be applied to terminate parental rights where, as here, the record establishes "the repeated and continued incapacity" of a parent to provide the child with the "essential parental care, control, or subsistence necessary for his physical or mental well-being."³

- A. Section 311(2) is not unconstitutionally vague because the language of the section and the decisions of this Court interpreting section 311(2) provide sufficiently precise guidelines to ensure reasonable notice and proper application.

Vague statutes may offend the Constitution in three ways: (1) they may trap the innocent by failing to give a person of ordinary intelligence reasonable opportunity to know what is prohibited so that he may act accordingly; (2) they may result in arbitrary and discriminatory enforcement in

3. The Attorney General was notified of the constitutional challenge to section 311(2) raised in these appeals, as prescribed by Pa. R.A.P. 521.

the absence of explicit guidelines for their application, and (3) where they implicate first amendment freedoms, they may inhibit constitutionally protected activity. Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). Appellants argue that the language "has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being" in section 311(2) presents all three dangers. See Alsager v. District Court of Polk City, Iowa, 406 F.Supp. 10 (S.D. Iowa 1975), aff'd in part 545 F.2d 1137 (8th Cir. 1976).

Considering first the question of notice, we believe appellants misperceive the nature of section 311(2). Unlike the typical statute attacked on vagueness grounds, section 311(2) does not prohibit or regulate any particular conduct.⁴ Section 311(2) is concerned only with the welfare of children whose essential needs have not been met, and whose parent cannot or will not meet those needs in the future. In the instant cases, the basis for termination is several years of demonstrated parental incapacity, which does not involve parental misconduct. When a

4. Legislation prescribing any particular mode of child rearing would likely be unconstitutional. See Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

statute attaches consequences to parental incapacity, a requirement that the statute "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," United States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954), serves no purpose, because the statute applies only to a parent incapable of conforming conduct to avoid the effect of the statute.

Of course, the other bases for termination relate to parental neglect, abuse, or refusal to meet the child's essential needs and thus involve parental misconduct. Section 311(2), however, requires that, before parental rights may be terminated, the court must find that the "conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent." 1 P.S. § 311(2) (Supp.1977). This requirement excludes the possibility that parental rights will be terminated because of insufficient notice, since the parent's inability or unwillingness to meet the child's essential needs must be affirmatively demonstrated. The requirement that parental conduct resulting in termination of parental rights be irreremediable negates appellants' notice argument.⁵

5. When termination is sought on the basis of parental conduct causing the child to be without essential parental care, the requirement that the conduct be shown to be irreremediable could be (footnote continued 7a)

Second, section 311(2) does not create the potential for arbitrary and discriminatory enforcement. The language of section 311(2) is broad and speaks in general terms, as do most statutes concerned with neglect.⁶ How-

 (footnote 5. continued) met rarely, if ever, absent evidence that the deficiencies in parental conduct had been identified, and the parent was nonetheless unwilling or unable to modify the conduct to remedy the situation. Moreover, because of the Commonwealth's commitment to the preservation of the family, when termination is sought by an agency, a normal element of the agency's proof will be that services have been made available to the parent to help remedy the causes of removal and have proved unavailing. See Adoption of R.I., 468 Pa. 287, 295 n.9, 361 A.2d 294, 298 n.9 (1976). We need not decide whether such a showing is required in light of the Commonwealth's public policy, since it is clear that both appellants have received years of assistance from Children's Services and related public agencies. See section II, *infra*.

6. See, e.g., Cal. Welf. & Inst. Code § 600 (West 1972).

Many commentators believe that, because of the many different circumstances which may justify intervention, general language is necessary in statutes authorizing intervention in the parent-child relationship. E.g., Katz, *When Parents Fail* 64 (1971) ("[Broad] neglect statutes recognize that 'neglectful' behavior (footnote continued 8a)

ever, our strong policy protecting the family from unwarranted state intrusion protects against arbitrary or discriminatory applications of section 311(2).

When the child is in the home, this on-going relationship will not be disturbed except upon a showing by clear and convincing evidence that removal is "clearly necessary." Adoption of R.I., 468 Pa. 287, 294, 361 A.2d 294, 297 (1976); Interest of Larue, 244 Pa. Super. 218, 366 A.2d 1271, 1275 (1976). It is not enough to justify termination of parental rights under section 311(2) to demonstrate that the home is "submarginal" and likely to result in a "cultural deprivation." In re Geiger, 459 Pa. 636, 640, 331 A.2d 172, 174 (1975). These decisions render agency officials powerless to remove a child from parental care and control absent a clear showing that the child either has been subjected to abuse or suffered serious harm, or that the threat of such harm is real and substantial and cannot be alleviated by means less drastic than removal.

Often, as in these appeals, the question of whether to terminate parental rights

(footnote 6. continued) can also vary, and thus cannot be easily or specifically defined. . . . The broad neglect statutes allow judges to examine each situation on its own facts."); Levine, Caveat Parens: A Demystification of the Child Protection System, 35 Pitt.L.Rev. 1, 17 (1973).

arises long after the unity of the family has been disrupted by separation of the child from the parent. Marjorie L's three sons have been in foster care since 1971; Gladys B's daughter Judith has been in foster care since 1974. Extended relegation of a child to the care of others as a result of parental incapacity or neglect is relevant in determining whether the child has been without essential parental care or control. See Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan, 405 U.S. 1051, 92 S. Ct. 1488, 31 L.Ed.2d 786 (1972); cf. In re Smith's Adoption, 412 Pa. 501, 194 A.2d 919 (1963) (that natural mother allowed foster parents to meet child's physical and mental needs for over a year was relevant to termination of parental rights). A stable family relationship is "necessary for [a child's] physical or mental well-being." "Continuity of parental affection and care provides the cornerstone for the child's sense of self worth and security; parental discipline and example develop the wellsprings of values and ideals." Note, In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings, 51 N.Y.U.L.Rev. 446, 450 (1976). The essential need of a child for close and continuous association with a parent or parent-figure is well recognized in psychological literature. See sources cited in *id.* at 449-51.

Accordingly, when a child has been placed in foster care, a parent has an affirmative duty to work towards the return of the child. See Involuntary Termination of Parental

Rights of S.C.B. and K.T., ___ Pa. ___, 379 A.2d 535 (1977); Appeal of Diane B., 456 Pa. 429, 321 A.2d 618 (1974). However, even when there has been a long separation occasioned by parental neglect or incapacity, termination of parental rights will not be ordered if there is a reasonable possibility that the causes and conditions which have led to the separation can be remedied and the family restored. Jones Appeal, 449 Pa. 543, 297 A.2d 117 (1972), demonstrates our deference to this requirement. There, although the mother was an accomplice to sexual abuse of her daughter, we refused to terminate her parental rights because the evidence did not establish that the causes or conditions leading to the abuse could not be remedied. *Id.* at 548, 297 A.2d at 120.

The language of section 311(2) does not admit of an interpretation permitting termination of parental rights based upon personal preferences or speculative concepts of proper child rearing. The needs of the child unmet by the parent must be "essential" and "necessary" to his "physical or mental well-being." In addition, the evidence must establish that the causes and conditions of the deprivation "cannot or will not be remedied."

We conclude that the demanding standards of section 311(2), together with the Legislature's and this Court's strong policy of restraint from interfering with the family, sufficiently protect against the arbitrary and discriminatory application of section

311(2).

Similarly, even assuming that decisions affecting private family concerns implicate first amendment values, see Griswold v. Connecticut, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965), we must reject appellants' argument that the language of section 311(2) may have a "chilling" effect on protected parental conduct. The decisions of this Court interpreting section 311(2) protect parental conduct which does not deprive the child of its essential needs. See In re Geiger, supra. However, parental misconduct which deprives the child of essential needs is not protected by the Constitution. Mr. Chief Justice Burger, writing for the Court, stated in Wisconsin v. Yoder: "To be sure, the power of the parent even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." 406 U.S. 205, 233-34, 92 S.Ct. 1526, 1542, 32 L.Ed.2d 15 (1972). Section 311(2) and our decisions are sufficiently clear to avoid any significant possibility a parent would be inhibited from engaging in protected conduct not constituting deprivation of essential needs of the child.

B. Section 311(2) does not violate substantive due process rights because a state may constitutionally intervene to terminate parental rights when a natural parent's continued incapacity causes the

child to be without essential parental care.

Appellants argue that the application of section 311(2) to terminate their respective parental rights, in the absence of a showing of "high and substantial misconduct" and that their children, while in their custody, had ever suffered substantial physical or mental harm, violates their constitutionally protected interest in mutual association with their children. We do not agree.

There is no doubt that the Constitution protects the family against certain intrusions by the state. Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), generally considered the seminal case recognizing constitutional protection of family concerns, invalidated a statute which prohibited teaching young children any language other than English because the statute unreasonably infringed upon the liberty interest protected by the fourteenth amendment of parents, teachers, and children. Noting that the contours of the liberty interest guaranteed by the fourteenth amendment had never been exactly defined, the Court stated: "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home, and bring up children . . ." *Id.* at 399, 43 S.Ct. at 626. Accord, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (striking down a statute requiring that all children attend public schools). In Prince v. Massachusetts, 321

U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the Court recognized that:

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. [citing Pierce] And it is in recognition of this that these decisions [Pierce and Meyer] have respected the private realm of family life which the state cannot enter."

Id. at 166, 64 S.Ct. at 442.

The continued vitality of the principle that there is a "private realm of family life which the state cannot enter" cannot be questioned. Just last term the United States Supreme Court stated that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499, 97 S.Ct. 1932, 1936, 52 L.Ed.2d 531 (1977) (plurality opinion). See also Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 829, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth

Amendment."); Wisconsin v. Yoder, 406 U.S. 205, 231-33, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972); Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972); Ginsberg v. New York, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968).

In related cases, the United States Supreme Court has recognized that the Constitution affords protection to "a right of personal privacy, or a guarantee of certain areas or zones of privacy." Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). See also Carey v. Population Services International, 431 U.S. 678, 684, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977) (plurality opinion); Whalen v. Roe, 429 U.S. 589, 598, 97 S.Ct. 869, 876 (1977); Griswold v. Connecticut, supra at 485, 85 S.Ct. at 1682. Personal decisions relating to child rearing are within this zone and protected from unwarranted interference by the state. Carey v. Population Services International, supra, 431 U.S. at 684, 97 S.Ct. at 2016 (plurality opinion), citing Pierce and Meyer.

These cases do not, however, support the proposition that the state can never interfere in the parent-child relationship. Indeed, in Stanley v. Illinois, supra, the United States Supreme Court recognized that the state had not only a right, but a duty to protect minor children. 405 U.S. at 649, 92 S.Ct. at 1212. See also Prince v. Massachusetts, supra (upholding anti-child labor statute against challenge that it unreasona-

bly infringed upon parent's and child's free exercise of religion and parent's right to educate child in her beliefs). Constitutional restraint on state interference in family matters does not compel the courts to protect parental rights at the expense of ignoring the rights and needs of children. In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the United States Supreme Court rejected the argument that the state's interest in protecting parental authority justified giving parents a veto power over a minor's decision to have an abortion "where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy has already fractured the family structure." Id. at 75, 96 S.Ct. at 2844. See also Wisconsin v. Yoder, 406 U.S. at 241-49, 92 S.Ct. at 1546-50 (concurring and dissenting opinion of Douglas, J.); In re Roger S., 19 Cal.3d 921, 141 Cal.Rptr. 298, 569 P.2d 1286 (1977) (unconstitutional to permit parent of fourteen year old child to commit the child to a mental institution over the child's objection). In determining whether parental rights should be terminated, the court must recognize the essential needs of the child as well as the rights of the parent.

The source of the state's authority to intervene in family matters to protect minor children has been said to be the doctrine of *parens patriae*, the concept that the sovereign is the father of his country. See, e. g., Adoption of R.I., 468 Pa. at 294, 361 A.

2d at 297. Although the doctrine of *parens patriae* has been subject to critical comment in recent years,⁷ there is general agreement that the state has the right and the duty to act to protect its weaker members, such as infants, who are unable to protect themselves,⁸ and to compel parents and children alike to act in ways beneficial to society.⁹ See Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 *Fam.L.Q.* 320 (1970), 4 *Fam.L.Q.* 410 (1970), 5 *Fam.L.Q.* 64 (1971). The state's responsibility to protect its weaker members authorizes interfer-

 7. The criticism has generally centered on its invocation to deny due process to infants. See, e.g., In re Gault, 387 U.S. 1, 16, 87 S. Ct. 1428, 1437-38, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) ("The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials of dubious relevance.")

8. E.g., Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (anti-child labor legislation); Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 2d 195 (1968) (variable obscenity standard to protect children).

9. E.g., requiring children to attend some school, at least to a certain age. Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S. Ct. 571, 573, 69 L.Ed. 1070 (1925); Wisconsin v. Yoder, 406 U.S. 205, 213, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1972).

ence with parental autonomy and decisionmaking in appropriate circumstances. The moral and practical importance of this authority was set forth by Chief Justice Maxey in Commonwealth ex rel. Children's Aid Society v. Gard:

"Societies which like the relator are entrusted by the sovereign with power over the lives of infants should ever bear in mind that consideration for the sensibilities of children and solicitude for their well-being is the hallmark of an humane individual and of a civilized state."

362 Pa. 85, 99, 66 A.2d 300, 307 (1949).

Parental rights must be accorded significant protection. Meyer v. Nebraska, supra; Pierce v. Society of Sisters, supra; Prince v. Massachusetts, supra; and Wisconsin v. Yoder, supra. The state may, however, constitutionally require the rights of parents to yield to the child's essential health and safety needs. See Wisconsin v. Yoder, supra; accord, In the Matter of Petition for Adoption of J.S.R., 374 A.2d 860 (D.C. 1977) ("[T]he right of a parent to raise one's child is an essential, but not absolute, one, which can be terminated . . .").¹⁰ When,

10. The District of Columbia Court of Appeals there upheld the involuntary termination of parental rights, finding that 1) the "best interest of the child" standard for involuntary termination is not unconstitutionally vague or (footnote continued 18a)

as here, a parent is incapable of meeting the child's essential needs, see section II, *infra*, the state may constitutionally intervene to protect the "physical or mental well-being" of the child. In these circumstances, the interest of the parent in keeping the child conflicts with the interest of the child in its essential physical and emotional needs and the Legislature has constitutionally mandated that the interests of the weaker party, the child, should prevail. This legislative determination must be accorded great deference for "when an issue involves policy choices as sensitive as those implicated by [the involuntary termination of parental rights], the appropriate forum for their resolution in a democracy is the legislature." Maher v. Roe, 432 U.S. 464, 97 S.Ct. 2376, 2385-86, 53 L.Ed.2d 484 (1977). As Mr. Justice Holmes stated in Missouri, Kansas and Texas Railway Company v. May, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971 (1904): "[L]egislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Therefore, appellants' assertion that

 (footnote 10. continued) violative of due process and 2) a finding of parental unfitness is unnecessary to a determination that the child's interests will be served by termination of parental rights. Accord, In re Petition of New England Home for Little Wanderers, 328 N.E.2d 854 (Mass.1975).

"high and substantial misconduct" on the part of the parent must be shown before parental rights may be constitutionally terminated cannot be accepted. Their contention ignores the state's constitutional interest in the welfare of the child.¹¹

II. THE DECREES OF THE ORPHANS' COURT DIVISION TERMINATING THE PARENTAL RIGHTS OF APPELLANTS ARE SUPPORTED BY COMPETENT EVIDENCE.

A. Scope of Review

Having determined that section 311(2) of the 1970 Adoption Act is constitutional, it remains to be determined whether the orphans' court properly applied the section to the facts of the instant cases. Our scope of review is limited to determining whether the orphans' court's terminations of appellants' parental rights are supported by competent evidence. E.g., In re: Involuntary Termination of Parental Rights of S.C.B. and K.T., ___, Pa. ___, ___, 379 A.2d 535, 540 (1977); Adoption of M.T.T., 467 Pa. 88, 354 A.2d 564 (1976); Adoption of Farabelli, 460 Pa. 423, 333 A.2d 846 (1975) (plurality opinion); Sheaffer Appeal, 452 Pa. 165, 305 A.2d 36

11. Appellants also argue that the language of section 311(2) requires a showing of a "high and substantial degree of misconduct." This contention was expressly rejected in In Adoption of R.I., 468 Pa. 287, 361 A.2d 294 (1976). See part II, *infra*.

(1973). Findings of the orphans' court supported by evidence of record are entitled to the same weight given a jury verdict and must be sustained unless the court abused its discretion or committed an error of law. E.g., Garges Estate, 474 Pa. 237, 378 A.2d 307 (1977); In re Wertman Estate, 462 Pa. 195, 340 A.2d 429 (1975); Button Estate, 459 Pa. 234, 328 A.2d 480 (1974); Cohen Will, 445 Pa. 549, 284 A.2d 754 (1971); Holtz Will, 422 Pa. 540, 222 A.2d 885 (1966); Hunter Will, 416 Pa. 127, 205 A.2d 97 (1964).¹²

B. The orphans' court division's determination that appellant Marjorie L.'s continued incapacity to care for her children, combined with her separation from her children since 1971, had caused her three sons to be without "essential parental care", and that this incapacity could not be remedied by appellant, is supported by competent evidence [Appeal at No. 46].

12. In determining whether the findings of the orphans' court are supported by competent evidence, we must take as true all the evidence supporting the findings and all reasonable inferences therefrom. See Kay v. Kay, 460 Pa. 680, 334 A.2d 585 (1975). Mr. Justice Nix, in his dissenting opinion, departs from this standard by drawing his own inferences contrary to the findings of the orphans' court. An appellate court is not free to draw inferences contrary to the findings of the orphans' court supported by competent evidence.

The three children involved in this appeal are Frank, age 13, William, age 11, and Mark, age 7. Pursuant to a voluntary placement agreement, all have been in the custody of Children's Services since June 8, 1971, when they were, respectively, ages 7, 5, and 1. Appellant has never married and none of the fathers of the three children has opposed termination of his parental rights.¹³ Appellant has two other children. Carol, the oldest, age 17, has lived with appellant's parents for many years and there are no plans for her to return to her mother. Appellant's youngest child, Tracie, age 6, lives with appellant.

Appellant was pregnant with Tracie at the time she placed her three sons with Children's Services had become involved with appellant and her children because of the severely substandard condition of the home which, according to appellant's caseworker, was unfit for habitation by children.¹⁴ Af-

13. Notice of the termination proceedings was sent to the last known addresses of the fathers of Frank and William. Neither father responded. Notice was sent to a man alleged to be the father of Mark. The man denied by affidavit that he was Mark's father, relinquished any parental rights he might have to Mark, and waived any right to further notice in this or any subsequent proceedings involving Mark.

14. The caseworker testified that the home was roach infested, (footnote continued 22a)

ter Tracie's birth Children's Services helped appellant locate an apartment. The apartment appellant selected could accommodate only appellant and Tracie.¹⁵ Frank, William and Mark continued to remain in foster care, and appellant visited them once a month at the Children's Services' office. In November, 1974, while still in the two-person apartment, appellant requested that her three sons be returned. The agency, concluding appellant was unable to provide the children with appropriate care and supervision, declined. Children's Services advised appellant of the availability of legal services and in December, 1975, with the assistance of counsel, appellant petitioned for visitation with the children in her home. The court of common pleas ordered that her visitation be increased to twice a month, and that visitation be at her home.

Shortly after the three boys entered foster care in 1971, nutrition aids began regularly visiting appellant's home to help her

(footnote 14. continued) that appellant had seen a rat near the refrigerator, and that appellant agreed that the housing was unfit for children. Appellant did not contradict this testimony.

15. According to the caseworker, appellant at first could not decide whether to take the apartment, or wait for housing which could accommodate all four children. She finally decided to take the smaller apartment, in which she still resides.

maintain her household and raise Tracie.¹⁶ Appellant has continuously relied heavily on those aids for even the more simple tasks of everyday life. The nutrition aid supervisor testified that in the three week period before the hearing appellant had visited her approximately seventeen times for assistance with various minor problems, even though the supervisor's office was some distance from appellant's home. Despite the continuous assistance, however, appellant has made little or no progress in learning how to cope with problems on her own, and the aids must necessarily continue to perform basic tasks for appellant.¹⁷

16. According to the nutrition aid supervisor, the program encompasses more than advice on food and diet planning. The aids advise on a variety of matters, including child care, money management, and housekeeping.

17. For example, at one time school authorities would not allow Tracie to go to school because she had lice. The supervising nutrition aid encountered great difficulty explaining to appellant, and having her perform, the necessary procedures to rid Tracie of the lice, which involved shampooing and using a special comb, to get the nits out of Tracie's hair. Appellant seemed unable to understand the necessity of removing the nits. When Tracie still had nits after two weeks, and was upset about missing school, the aid treated Tracie.

Similarly, appellant has made no significant progress in (footnote continued 24a)

The record establishes that appellant is minimally capable of caring for her youngest

(footnote 17. continued) learning how to budget and manage her money. In the past, appellant's heat and electricity were frequently turned off because she neglected to pay her bills. On one occasion, appellant came to the nutrition aid supervisor requesting emergency financial assistance because she believed she owed money for rent, gas, water, and lights. When the aid contacted various utilities and appellant's landlord (the housing project director) she learned that, in fact, appellant did not owe money to any of them. Workers at the Salvation Army told the nutrition aid that appellant came to them frequently with similar requests. There was no indication that appellant intended to defraud anyone; rather, she simply was unable to keep track of her income.

The nutrition aids suspected that others often took advantage of appellant's inability to manage her money. On several occasions appellant told the nutrition aids of giving money to people for such things as toys, which were never delivered. Appellant's sole income is a monthly Supplemental Security Income (SSI) allowance. One nutrition aid observed on three different occasions that a creditor came to appellant's house on the day her check arrived and appellant turned over her check to him. He took the checks, cashed them, and, after deducting money allegedly due, returned what was left.

daughter Tracie, even with the extensive assistance she receives from the nutrition aids. The record also establishes, however, that appellant's capabilities are taxed beyond their limits when she attempts to supervise and control her three sons, in addition to Tracie. The caseworkers and aids present during the custodial visits ordered in 1975, which continued regularly up to the time of the hearing in May, 1976, testified that general havoc prevailed during the visits. They described the visits as "free-for-alls" in which appellant chased one child after another attempting to keep them under control. The visits failed to re-establish closer ties between appellant and the boys. Frank and William were observed to "tolerate their mother." Mark, who has been with the same foster family since he was one year old, was unable to relate emotionally to appellant or his brothers and would simply watch television.

All three children testified in chambers and, although they expressed some affection for appellant, agreed that they did not want to live with appellant. Frank, then 13, openly admitted that he refused to obey appellant and that she was incapable of doing anything about it. He believed that appellant would not be able to care for him and his brothers.

In January, 1976, appellant, at the request of Children's Services, agreed to be interviewed and tested by a psychologist. The psychologist administered a structured interview called the Vinelin Social Maturity

Scale and the standardized Slosson Intelligence Test. The first test indicated that appellant's social skills and ability to function independently were at about the twelve year old level. The intelligence test, which measures numerical and verbal reasoning skills, indicated that appellant had an IQ of 43 and a mental age of six years, ten months.¹⁸ Although appellant testified at the hearing that she had completed the seventh grade in school, she told the psychologist that she did not know how to read. The psychologist testified that appellant had limited communication skills and showed considerable difficulty in comprehending simple ideas concerning housework, cooking, and child care. In her psychological evaluation, the psychologist concluded that appellant lacked the social maturity and intellectual capability to cope with the continuing responsibilities of raising children.¹⁹

18. Appellant began failing test items at the five year level and low six year level. She passed a few items at the seven and eight year level, but did not pass any of the test items at the nine year level and above.

In 1963, when hospitalized after suffering from apparent hallucinations, appellant was administered the Weschler Adult Intelligence Test, which rated her IQ at 57. The psychologist testified that both scores placed appellant in the range of the educable or trainable mentally retarded.

19. Although the (footnote continued 27a)

The orphans' court terminated appellant's parental rights to her three sons pursuant to section 311(2) of the Adoption Act. As this Court observed in In re Geiger, 459 Pa. 636, 639, 331 A.2d 172, 174 (1975), this section requires that three facts be shown before parental rights may be terminated: (1) repeated and continued incapacity, abuse, neglect, or refusal; (2) such incapacity, abuse, neglect, or refusal has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being; and (3) the causes of the incapacity, abuse, neglect, or refusal cannot

 (footnote 19. continued) psychologist did not testify directly concerning appellant's mental health, there is evidence suggesting that appellant suffers from some mental instability. In 1963 appellant was hospitalized for a month after suffering from the delusion that she was pregnant and about to deliver. The supervising nutrition aid testified that appellant once asked her to locate a certain boyfriend of appellant's. Upon investigation, the aid discovered that the boyfriend did not exist. Another aid testified to a story appellant had told her, which appellant repeated under examination by Children's Services' counsel at the hearing, of having seen her mother kill her father when appellant was a young girl, after which her mother buried him in the family's back yard. The circumstances surrounding appellant's relation of this story rendered it incredible.

or will not be remedied. A decision to terminate parental rights, never to be made lightly or without a sense of compassion for the parent, can seldom be more difficult than when termination is based upon parental incapacity. The Legislature, however, in enacting the 1970 Adoption Act, concluded that a parent who is incapable of performing parental duties is just as parentally unfit as one who refuses to perform the duties. The orphans' court properly adhered to this statutory determination and concluded that the elements of the statute -- continued incapacity to meet the children's essential needs -- had been demonstrated by clear and convincing evidence. The orphans' court stated:

"It is absolutely clear to the court that, by reason of her very limited social and intellectual development combined with her five year separation from the children, the mother is incapable of providing minimal care, control and supervision for the three children. Her incapacity cannot and will not be remedied."

Having first determined that grounds for termination existed, the orphans' court held that the best interests of Frank, William and Mark dictated that appellant's parental rights be terminated in order that the opportunity might be afforded the three boys to enjoy a stable family relationship through adoption. We find the decree of the orphan's court supported by competent evidence.

Appellant argues that the decree cannot be sustained because there was no compelling

evidence that Frank, William, and Mark, while in her care, were ever neglected, abused, or abandoned by appellant or deprived of a basic health need such as food, medical care, clothing, or shelter. Appellant also asserts that a "high and substantial degree of misconduct" by the parent must be demonstrated before the parent's rights to a child may be terminated. She contends that section 311(2) requires a showing that substantial physical or mental harm resulted from the absence of a basic necessity such as food, clothing, shelter, or medical care, and that such harm occurred while the child was living with its parent. Finally, appellant argues that a child cannot be deprived of "essential parental care, control, or subsistence" while in foster care.

Nothing in the language of the act requires a showing of a "high and substantial degree of misconduct" before parental rights can be terminated.²⁰ In Adoption of R.I., 468 Pa. 287, 361 A.2d 294 (1976), this Court rejected the contention that "willful misconduct" was a necessary predicate to termination of parental rights. *Id.* at 297-98 n.10, 361 A.2d at 299 n.10. The notion that a showing of parental misconduct is necessary before parental rights may be terminated rests upon the erroneous assumption that the purpose of section 311(2) is to punish an ineffective or negligent parent. Section 311(2) reflects a

20. Appellant contends that such an interpretation is constitutionally compelled. This argument was rejected in part I, *supra*.

deep concern for the essential needs of the child, not a legislative vengeance against parental misconduct. The official comment to the Adoption Act of 1970 states that the provision "centers judicial inquiry upon the welfare of the child rather than the fault of the parent." Joint State Government Commission, Official Comment, Adoption Act (1970). Thus, section 311(2) authorizes termination upon a showing of parental incapacity, when the incapacity "cannot or will not be remedied by the parent" and has "caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being." The Legislature clearly mandated that, in such circumstances, the "physical or mental well-being" of the child must be protected.

Neither the language of section 311(2) nor our case law supports appellant's contention that section 311(2) requires a showing that the child suffered substantial physical or mental harm while in the parent's custody, see Appeal of Diane B., 456 Pa. 429, 321 A.2d 618 (1974), or that a child cannot be deprived of "essential parental care, control, or subsistence" while in foster care, see Adoption of R.I., 468 Pa. 287, 361 A.2d 294 (1976). Appellant argues that her narrow construction is necessary to protect the family from unwarranted and potentially harmful intrusions by the state. However, the need to guard against unwarranted state intrusion in family affairs does not require an interpretation of section 311(2) precluding its

application in circumstances where, as here, the family has no prospect of being reunited and the physical and mental needs of the three children, who have already been out of the home since 1971, cannot be met by the parent.

It is the policy of this Commonwealth to preserve and protect the family whenever possible. The Juvenile Act like the Adoption Act, concerns state intervention in the parent-child relationship when essential to protect the welfare of the child.²¹ The Juvenile Act provides:

"This Act shall be interpreted and construed as to effectuate the following purposes:

- (1) To preserve the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this act.
- (3) To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his welfare

21. To the extent that both acts relate to state intervention in the parent-child relationship, the Juvenile Act and the Adoption Act may be considered in *pari materia*. 1 Pa. C.S.A. § 1932 (Supp.1977). See Adoption of R.I., 468 Pa. 287, 295 n.9, 361 A.2d 294, 298 n.9 (1976).

or in the interest of public safety." Act of December 6, 1972, P.L. 1464, § 1(b)(1), (3), 11 P.S. § 50-101(b)(1), (3) (Supp.1977). Thus, our courts have held that, under the Juvenile Act, the state may act to remove a child from its home only upon a showing of "clear necessity." Adoption of R.I., 468 Pa. at 294, 361 A.2d at 297(dictum); Interest of Larue, 244 Pa.Super. 218, 225, 366 A.2d 1271, 1275 (1976); Stapleton v. Dauphin County Child Care Services, 228 Pa.Super. 371, 391, 324 A. 2d 562, 572 (1974); Rinker Appeal, 180 Pa.Super. 143, 117 A.2d 780 (1955).

This policy of restraint, however, is not intended solely to protect the rights of parents. Continuity of relationships is also important to a child, for whom severance of close parental ties is usually extremely painful. Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* 20, 31-34 (1973), cited in Wald, "Search for Realistic Standards," *supra* at 994. Thus the policy of restraint is incorporated in the demanding standards of our removal and termination statutes to protect the family from harmful and unwarranted state intrusion.

The "continuity of relationships" consideration, however, is equally applicable where, as here, the child has lived with one foster family for a considerable period of time. Removal of the children from their foster homes, or inflicting upon them the fear that they might be removed at any time, could create psychological and emotional distress sim-

ilar to that caused by their removal from their natural parent. See Adoption of R.I., supra, 468 Pa. at 299 n.13, 361 A.2d at 300 n.13; Commonwealth ex rel. Children's Aid Society v. Gard, 362 Pa. 85, 97, 66 A.2d 300, 306 (1949); Foster, Adoption and Child Custody: Best Interests of the Child? 22 Buff. L.Rev. 1, 11-14 n.8 (1972). The language of section 311(2) should not, therefore, be read to compel courts to ignore a child's need for a stable home and strong, continuous parental ties, which the policy of restraint in state intervention is intended to protect, where, as here, disruption of the family has already occurred and there is no reasonable prospect for reuniting it without serious emotional harm to the child. In such circumstances, the issue is not whether the state should intrude to disrupt an on-going family relationship, but whether the state should seek to preserve in law a relationship which no longer exists in fact, with the result that the child is consigned indefinitely to the limbo of foster care or the impersonal care of institutions.

Appellant's contention that a child can never be without essential parental care while in a foster home is neither²² factually correct nor required by the law. Appel-

22. Our courts have long recognized that a biological parent's claim to a child can be weakened by long separation causing the parent's relationship with the child to dwindle, while the child de- (footnote continued 34a)

(footnote 22. continued) velops other, more stable ties. In Commonwealth ex rel. Children's Aid Society v. Gard, Chief Justice Maxey, writing for the Court, observed that a child will become strongly attached to those

"who stand in parental relationship to it and who have tenderly cared for it. Its bonds of affection [may] have become so strong that to sunder them suddenly may result not only in the child's unhappiness, but also in its physical injury. . . . Nothing could be more cruel than the forceable separation of a child from either its real or foster parents by whom it has been lovingly cared for and to whom it is bound by strong ties of affection; to a child it is equally cruel whether the separation is brought about by 'kidnapping' or by legal process. In passing on the contested custody of children no judge can do justice without considering the human aspect of this problem."

362 Pa. 85, 97-98, 66 A.2d 300, 306 (1949). See Davies Adoption Case, 353 Pa. 579, 588, 46 A.2d 252, 257 (1946); Stapleton v. Dauphin County Child Care Services, 228 Pa.Super.371, 324 A.2d 562 (1974).

In Smith Adoption Case, this Court recognized that parental rights may be terminated if a parent does not affirmatively act to meet the child's essential needs but rather allows others to meet those needs. We there stated:

"Parental rights may not be preserved by complete indifference to the daily needs of a child or by (footnote continued 35a)

lant's interpretation of section 311(2) would, contrary to the legislative mandate, protect the rights of a parent long separated from her child at the expense of the essential physical and mental needs of the child. To the contrary, when continued incapacity prevents a parent from caring for the child and, as a result, the parent-child relationship is substantially "weakened by long separation"

 (footnote 22. continued) merely waiting for some more suitable financial circumstances or convenient time for the performance of parental duties and responsibilities (while others adequately provide the child with her immediate and continuing physical and emotional needs). The parental obligation is a positive duty and requires affirmative performance which may not be delayed beyond the statutory period by the parent if the parental right is not to be forfeited."

412 Pa. 501, 506, 194 A.2d 919, 922 (1963).

Although Gard and Stapleton involved custody disputes, and Davies and Smith involved abandonment, the principle that a parent's claim to his child is weakened by long separation and development by the child of other, closer, attachments applies equally to a proceeding under section 311(2) which, "is intended to center judicial inquiry upon the welfare of the child, rather than the fault of the parent." Joint State Government Commission, Official Comment, Adoption Act (1970).

and cannot be re-established, parental rights may be terminated so that the child may have an opportunity to escape the limbo of foster or institutional care and establish a new parent-child relationship through adoption.

Here appellant's three sons have been in foster care since 1971. Perhaps in recognition of her own inability to care for them, appellant made no effort to secure the return of her three sons for more than three years.²³ Despite her regular visits, appellant's relationship with her sons, especially the youngest, has greatly deteriorated. All three regard their foster parents with affection²⁴

 23. The orphans' court found as a fact that the "mother began to request the return of the children in November of 1974."

Appellant's caseworker testified that appellant made no request for the return of her sons before November, 1974. Appellant testified that she had "asked to have them all back, but just like I say, the caseworker just gives you the run around, and I went to Legal Aid Society, went in the middle part of January." She did not indicate when she first requested their return before going to legal aid in January, 1975.

24. The foster parents of Mark, who has been with the same foster family since 1971 when he was one year old, and the foster parents of William, who was five years old at the time of placement in 1971, have told Children's Services they are interested in adopting the boys. Frank(footnote continued 37a)

and have no desire to return to appellant's custody. In determining whether appellant's continued incapacity had caused them to be "without essential parental care, control, or subsistence necessary for [their] physical or mental well-being," the orphans' court properly considered the fact that appellant's inability to care for the three boys since 1971 effectively precluded the possibility that the family would ever be reunited.²⁵ The orphans'

 (footnote 24. continued) referred to his foster mother as "mom" and expressed his clear preference to remain with his foster parents.

Appellant's own testimony indicated attenuation of the relationship between herself and her sons. Appellant demonstrated little knowledge of the habits and interests of her sons, other than that they liked to watch TV and play baseball. She was unaware of what grade in school any of the boys was in, or how they were doing in school.

25. This conclusion is consistent with our decisions in Adoption of R.I., 468 Pa. 287, 361 A.2d 294 (1976) and In re Geiger, 459 Pa. 636, 331 A.2d 172 (1975). In Adoption of R.I., we rejected the requirement of a showing of "willful misconduct" because it "would deny R.I. the benefits of a family through adoption and continue the long period of temporary care to protect a possible reunion which has been shown will not occur." 468 Pa. at 298 n.11, 361 A 2d at 299 n.11. Although in holding that R.I. had been deprived of essential parental care we (footnote continued 38a)

(footnote 25. continued) relied on evidence of physical deprivation leading up to her removal from the home, nothing in our opinion indicates that her long stay in foster care was irrelevant to this question, and we clearly relied upon the long stay in foster care in determining that the neglect or incapacity of her natural mother was irremediable.

In Geiger, we reversed an order terminating a mother's parental rights. The termination was based on opinion evidence that the house was "'submarginal'" and "'was setting a cultural standard for these children which would be a deprivation in the future." 459 Pa. at 640, 331 A.2d at 174 (emphasis in original). There, the child welfare agency had removed the children from the home on this basis and sought termination of the rights of both parents. The propriety of the removal was not before us. However, unlike here, there was no allegation that the children had spent any substantial time out of the home or that, with agency assistance, the family could not be reunited.

Appellant's assertion that, before her rights can be terminated pursuant to section 311(2), it must be shown that her children suffered some substantial harm such as deprivation of food, clothing, or shelter while in parental custody, is contradicted by Appeal of Diane B., 456 Pa. 429, 321 A.2d 618 (1974). Like appellant, the mother in Diane B. voluntarily placed her child in the custody of the children's agency. Nonetheless, this Court held that the mother's subsequent conduct in failing to support her child or maintain a close re- (footnote continued 39a)

court concluded that "the mother will never be capable, in our judgment, of resuming custody. The choice is between the limbo of continuing fosterhood and the potentiality of a normal parent-child relationship."

The orphans' court determination that appellant's continued inability²⁶ to care for her three sons, combined with her separation from her children since 1971, had caused her three sons to be without "essential parental care, control or subsistence necessary for

 (footnote 25. continued) lationship with the child caused the child to be "without essential parental care" and justified termination of the mother's rights under section 211(2). 26. In reviewing whether the evidence supports the orphans' court decree, we have placed only limited reliance on appellant's IQ score. Experts generally agree that socially and culturally disadvantaged people tend to score lower on standardized intelligence tests, which suggests that cultural bias may affect the result. See Galliher, Termination of the Parent-Child Relationship: Should Parental I.Q. be an Important Factor?, Law and the Social Order 855, 865-66 (1973). Moreover, "No Study has ever documented the premise that unintelligent parents are unable to give love and affection." Id. at 871. Consequently, we consider appellant's test score only as a factor among many relevant to her incapacity to meet the essential needs of her children.

[their] physical or mental well-being," and that this incapacity could not or would not be remedied by appellant is supported by competent evidence. See Appeal of Diane B., 456 Pa. 429, 321 A.2d 618 (1974).

- C. The orphans' court division's determination that appellant Gladys B.'s "repeated and continued incapacity" to maintain a safe and sanitary home had caused her daughter Judith to be without "essential parental care, control or subsistence" and that such incapacity would not or could not be remedied is supported by competent evidence. [Appeal at No. 113].

Judith Denise B., age 11, is appellant Gladys B.'s youngest child. Judith's father left the home many years ago and his whereabouts are unknown. Judith has been in foster care since November, 1974, pursuant to an order granting custody of Judith to appellee, Lycoming County Children's Services [Children's Services].²⁷

In 1974, four of appellant's six minor

27. The juvenile proceedings were not incorporated in the record, but the record does indicate that custody was taken from appellant because previous court-ordered efforts by Children's Services to help improve the physical conditions in the home had been unsuccessful and because Judith participated with her older brothers in the commission of a juvenile offense.

children resided with her -- Dorothy, then age 17, Boyd, then age 15, David, then age 12, and Judith, then age 9. An older daughter, Joan, and her two children also resided with appellant.²⁸ Appellant was well known to public health officials and Children's Services as a result of frequent complaints received over the years concerning extremely unsanitary conditions in the different homes in which the family had lived. Children's Services had worked with the family since 1966. The caseworker involved from August 1971 until August 1975 testified that, without exception, when she visited appellant's home the floor was strewn with raw garbage on which one could not avoid stepping. She observed dogs running free throughout the house, eating off dirty diapers, and occasionally stealing food from the plates of the younger children.

A Williamsport Public Health Officer testified to responding regularly over a ten year period to complaints filed by neighbors while appellant lived at seven different addresses. Typically, the complaints related to insect and rodent infestation and accumulations of garbage. Invariably, he found the houses grossly unsanitary, with garbage scattered both inside and about the home. Dirty clothes and particles of food were all over the floors; during the summers, he observed maggots in the food. Appellant's refriger-

28. Appellant has one other older daughter, Shirley, who apparently lived elsewhere at that time.

ator was always filthy and usually contained moldy food. Roach infestation was the norm, and in appellant's last two residences, including the residence she occupied with the children in 1974, roaches were even inside the refrigerator. About the time Judith was placed in foster care, appellant was evicted from her residence in the housing project. The public health officer testified that the whole row of houses adjoining appellant's residence had to be fumigated, which took about four months. He testified that most of the twenty-five to thirty times he visited appellant's residences they were so unsanitary as to be unfit for human habitation.

A school counselor, associated with appellant's family over an eight year period, corroborated the testimony concerning the condition of the homes. In the course of her work she visited appellant at three different residences. At each residence raw garbage and food was scattered on the floor and the odor of animal feces permeated the air. The counselor met appellant while working with Judith's brother David, who was a truancy problem. Children at school teased David because of his filthy clothes and lack of personal hygiene. The counselor testified that appellant listened to her recommendations, but did nothing to correct the problems.

In February, 1974, a juvenile probation officer visited the home. It was extremely squalid. The windows were out, a condition the public health officer testified was common at appellant's residences. Room temper-

ature was below freezing and there was no heat. The probation officer could not recall if he had seen Judith, but the children he observed were inadequately clothed, including an infant wearing only a diaper. In an apparent effort to heat the house, the gas burners on the stove were turned on at full capacity. Nearby, dirty laundry was stacked up, creating an alarming fire hazard.

These conditions, as well as complaints from neighbors concerning a lack of supervision over the children, led Children's Services to seek custody of Judith in the Spring of 1974. Rather than remove Judith at that time, the court ordered Children's Services to visit the home regularly and assist appellant in improving conditions.

In March, 1974, Judith's sister Dorothy, then 17, was involved in a burglary. The juvenile court removed Dorothy from the home and placed her in foster care where she remained until she was 19. She is now enrolled in college and living outside the home. Judith's brother Boyd, then 15, was also involved in juvenile offenses. In 1973, he was before the juvenile court twice, once for burglary and larceny, and a second time for burglary. In October of 1974, he was again before the juvenile court for bicycle thefts, in which he had enlisted the aid of his 13 year old brother David and Judith, then 9 years old. Boyd was removed from the home and placed in a juvenile institution where, according to the testimony, he had an excellent record and improved educationally and

socially. He returned to the home in November 1975, but less than three months later, he was again removed after yet another theft offense. He was placed in a residential work experience program where, once again, he had an excellent record and seemed to mature considerably. He completed the program, returning home in August, 1976. His caseworker testified that, at age 17, he appeared sufficiently mature to get by on his own.

David and Judith were also removed from the home following the theft offense. After completing a youth development program, David was placed in a foster home and is now in a private group home. There are no plans for his return to appellant's custody.

Appellant's caseworker testified that, rather than improving, appellant's home deteriorated from Spring, 1974, when Children's Services first petitioned for Judith's custody, until October, 1974, when Judith was removed. Moreover, Judith's involvement in the bicycle thefts and her increasing truancy indicated that serious behavioral problems were developing. Since placed in the custody of Children's Services, she has been in a stable foster home and appears well adjusted. Children's Services considers her prospects for adoption excellent.

After appellant's minor children had been removed from the home in 1974, Children's Services attempted to develop a plan with appellant which would allow Judith to return.

The plan involving working with nutrition aids to improve her housekeeping and food preparation skills, seeking counseling, and allowing caseworkers to monitor conditions in the home. There was testimony that aids and caseworkers visited the home on a few occasions when conditions seemed to have improved and the home appeared reasonably sanitary. However, opportunities for observation of conditions in the home were limited because appellant was often not at home, or did not answer the door, when the nutrition aid arrived for scheduled visits, or a caseworker came to the house. Sometimes appellant or her daughter Joan refused to allow the caseworker inside and spoke to her at the door or through a window.

That unsanitary conditions persisted in the home was again revealed in February, 1976. David had run away from his foster home and juvenile probation caseworkers came to appellant's home where David was hiding. The conditions were so deplorable that the juvenile officers requested Children's Services to make an immediate visit. Although all of appellant's minor children were then living elsewhere, the agency was concerned about the infant children of Joan, appellant's daughter. Garbage and food were strewn on the floors throughout the house, including the upstairs. Dirty diapers were found on the floors, along with feces from several dogs and cats, causing a foul odor to permeate the house. Photographs confirm the testimony describing these grossly unsanitary conditions.

Children's Services petitioned for custody of Joan's children. The agency reached an agreement with Joan whereby she obtained and is maintaining a separate residence with her children.

Appellant's willingness to cooperate with Children's Services in improving the conditions of her different residences and supervising her children has varied over the years. At times, she has listened to the suggestions of caseworkers and expressed her intention to improve her housekeeping and child care skills. Similarly, the public health officer and the school counselor who worked with David testified that appellant would hear them out and promise to follow their suggestions. Invariably, however, appellant made no effort to alleviate the offensive conditions. At other times, appellant expressed hostility towards the agency and the caseworkers for interfering in her life. Nutrition aides discontinued their visits in late 1975 because appellant was never home at the agreed times.

Appellant, who completed only two years of schooling and is illiterate, has shown over the years almost no comprehension of even rudimentary standards necessary to maintain minimal living conditions and to supervise her children. Repeatedly, she expressed a complete inability to control the children, whom she blamed for the unsanitary conditions. For example, when advised by different caseworkers that the animals running loose throughout the house had to be controlled, she answered that she could do nothing

about them because they were the children's pets.

The orphans' court concluded that, although appellant appeared to love Judith, the evidence clearly established appellant's "continued and repeated incapacity" which had caused Judith to be without "essential parental care, control or subsistence necessary for her physical and mental well-being." The court found that this incapacity, which it attributed primarily to appellant's lack of emotional control and self-discipline, was irremediable. Having determined that grounds existed justifying termination of appellant's parental rights under section 311(2) of the Adoption Act, the court concluded that Judith's best interests would be served by terminating appellant's parental rights so that Judith might be adopted into a responsible family, able to meet her essential needs.²⁹ The decree of the orphans' court is supported by adequate and competent evidence.

As in the appeal of Marjorie L., appellant

29. Appellant has not argued that, even if grounds justifying termination under section 311(2) have been shown, it would be in Judith's best interests to deny the petition. We note only that the orphans' court considered this possibility and concluded that, particularly in light of the progress which had been made by Dorothy and Boyd outside the home, Judith's best interests would be served by adoption.

Gladys B. argues that the decree cannot be sustained because there was no compelling evidence of a "high and substantial degree of misconduct" by appellant or that Judith, while in appellant's custody, ever suffered serious harm from lack of food, clothing or shelter. We rejected the former argument in Part II B of this opinion, insofar as it relates to the requirements of the Adoption Act. Although Judith never suffered serious harm while in appellant's custody, the record fully supports the orphans' court's finding that the conditions in appellant's homes while Judith was in her custody constituted a serious threat to Judith's health and safety. We cannot agree with appellant that where, as here, a serious threat to health and safety has been shown, the court cannot terminate parental rights until serious harm actually occurs. It would indeed be an insensitive requirement that actual harm must first come to the child before the Commonwealth's interest in the child's health and welfare could be invoked.

Appellant's reliance upon In re Geiger, 459 Pa. 636, 331 A.2d 172 (1975), in which this Court reversed a decree terminating parental rights under section 311(2), is misplaced. Geiger does not support appellant's contention that substantial physical harm to the child must first be shown before parental rights may be terminated. In Geiger, the orphans' court relied upon evidence that the home condition was "submarginal" and would cause, a "cultural deprivation" in the future to support termination of the parent's

rights. Here, unlike in Geiger, the orphans' court's decree was based upon substantial evidence establishing that the conditions in appellant's different homes presented a serious health and safety hazard, and not merely a "cultural deprivation."

In addition to the threat to Judith's health presented by appellant's inability to maintain a safe and sanitary home, the record supports the orphans' court's conclusion that appellant is incapable of supervising Judith. Appellant admitted she was unable to control her children when they were at home and, before Judith was taken from appellant's custody, Judith appeared to be entering the same pattern of delinquency exhibited by her older brothers and sister.³⁰

30. We do not imply that evidence of delinquent behavior, standing alone, justifies an inference of parental incapacity to provide proper care, control and supervision of the child, for the causes of juvenile crime are too myriad, complex, and imperfectly understood. See generally, M. Wolfgang and L. Radzinowicz, *Crime and Justice* (1971). Here, however, appellant's own testimony indicated that appellant was unable to control the children and, at least with regard to Judith, Boyd, and Dorothy, their antisocial behavior ceased whenever they were outside appellant's home and in the custody of others.

Judith had been in foster care since 1974. Appellant's incapacity to maintain a minimally adequate home or to supervise her children, which has already led to the disruption of the family for many years, has not been remedied despite ten years of assistance from caseworkers, nutrition aides, public health officials, and school counselors. The orphans' court properly concluded that appellant's incapacity would not or could not be remedied.

D. Summary

We hold that section 311(2) is not unconstitutionally vague in light of its demanding standards and the strong policy of restraint from interfering in the family developed in our case law. We also hold that, on the facts of these cases, the application of section 311(2) to terminate appellants' parental rights is constitutionally permissible. Finally, we hold that there is competent evidence in each appeal supporting the orphans' court's decrees terminating appellants' parental rights pursuant to section 311(2) of the Adoption Act.

Decree in Appeal No. 46 terminating the parental rights of Marjorie L. is affirmed. Each party to pay own costs.

Decree in Appeal No. 113 terminating the parental rights of Gladys B. is affirmed. Each party to pay own costs.

NIX, J., filed a concurring and dissent-

ing opinion.

MANDERINO, J., filed a dissenting opinion.

NIX, Justice, concurring and dissenting.

I dissent as to the termination of parental rights of appellant Marjorie L., not only because the facts of this appeal, as accepted by the majority, clearly do not warrant termination of parental rights due to incapacity under section 311(2), but also because the majority's expansive interpretation of this section creates serious constitutional problems.

Appellant, Marjorie L., is the natural mother of three boys, Frank, William and Mark. It is with respect to these three sons that the Lycoming County Children's Services Agency (Children's Services) sought involuntary termination of appellant's parental rights. Appellant, who currently resides with her six-year-old daughter, Tracie, in a public housing project, subsists on a Supplemental Social Security Income Allowance, public assistance grants, and food stamps. Psychological testing indicated that appellant is mentally retarded but educable and trainable.¹

1. The majority's suggestion that appellant suffers from some mental instability is without support in the record. There was no finding by the lower court that appellant was mentally unsta- (footnote continued 52a)

(footnote 1. continued) ble, and the delusion of pregnancy suffered by appellant nearly 15 years ago, and referred to by the majority, could hardly constitute substantial evidence of a present instability. See Adoption of Farabelli, 460 Pa. 423, 333 A.2d 846 (1975). In straining to find support for the theory that appellant "suffered from some mental instability", the majority takes facially neutral evidence and wrenches factual interferences that are unwarranted and unfavorable to appellant. In describing appellant's failure to locate a certain boyfriend, the majority states that the boyfriend did not exist. Although these were the words used by appellee's witness to describe the witness' unsuccessful attempt to locate the boyfriend, the context of the comment shows that the witness merely meant that she could not establish the identity of the boyfriend, nor that the boyfriend was a figment of appellant's imagination.

The testimony of the county nutrition aide supervisor concerning appellant's account of her father's death, although of highly questionable relevance, was also seized upon by the majority to support its thesis of mental instability. Although appellant later adopted this account and it was not rebutted, the majority transforms this testimony into evidence of appellant's delusions by stating that "the circumstances surrounding appellant's relation of this story rendered it incredible." If such stories were incredible merely because they were bizarre, this Court could quickly dispose of numerous homicide appeals by discharging defendants who committed "incredi- (footnote continued 53a)

The record shows that in June of 1971, due to the unhealthy condition of her dwelling at that time, her advanced stage of pregnancy and her difficulty in finding day care assistance for her sons,² appellant voluntarily placed her sons in custody of Children's Services, with every expectation that she would regain custody of her sons as soon as her situation improved. The sons have lived in foster homes since June of 1971. Children's Services set up a visitation schedule, and from June, 1971 until November, 1974, appellant and her sons met on a monthly basis, usually at the Children's Services offices, but occasionally, during summer months, at nearby parks. After seeking legal assistance, appellant, in December, 1975 obtained a court decree increasing the visits to bi-monthly and allowing the visits to take place at appellant's home. Over the years, appellant has never missed any of the visits with her sons, and the record shows that during the home visits, appellant fed, entertained and conversed with her sons. To the extent possible under the circumstances, appellant has maintained continual contact with her sons and has kept abreast of her sons' activities; despite her difficult financial position, appellant has remembered her sons with gifts on special occasions such as Christmas or Easter. Since June of 1971, appellant frequently ex-

(footnote 1. continued) ble" murders.

2. At that time her sons ranged in age from one year to seven years. Tracie was born in September, 1971.

pressed to Children's Services officials, nutrition aides, and the county nutrition aide supervisor her desire to regain custody of her sons.

Shortly after the birth of her daughter Tracie in September, 1971, in order to provide a better home, appellant moved to the housing project where she now lives. The record shows that appellant is a conscientious mother; she maintains a clean, healthy home and provides adequate care for Tracie. Because of her limitations appellant has frequently enlisted the help of nutrition aides to maintain her household; she has always cooperated with these aides. Notwithstanding appellant's low intelligence, focused upon by the majority, during the proceedings in the lower court, appellant was lucid in her responses to direct examination, cross-examination and questions from the bench. The thirty pages of appellant's transcribed testimony presented the picture of a mother who was knowledgeable in all facets of her daily existence; she knew her sources of income, the nature of her responsibility to her daughter, and she was acutely aware of the serious nature of the termination proceedings. In response to counsel's question as to what effect the loss of her sons would have upon her, appellant said, "I'm going to take it pretty hard." The majority's characterization of appellant as a deluded retard is grossly inaccurate. Her voluntary decision to seek the aid of a social agency in June of 1971 is but another indication of appellant's ability to appraise the needs of her family, to recognize when

they were not being adequately provided for, and to successfully secure effective means to meet the needs of her children.

Section 311(2), upon which the termination of parental rights rests in the instant appeal, provides for such termination on the ground that:

"(2) The repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent:"

Act of July 24, 1970, P.L. 620, No. 208, art. III, § 311(2), 1 P.S. § 311(2) (Supp. 1977-78).

The majority asserts that "the basis for termination is several years of demonstrated parental incapacity, which does not involve parental misconduct." In my judgment this premise ignores the record and introduces an insidious and dangerous philosophy completely at odds with fundamental American values. First, I take issue with the claim that there has been a demonstration of parental incapacity as envisioned in this section. The majority relies upon the fact that Marjorie L.'s limited intelligence handicaps her in the performance of her parental responsibilities. I would not dispute the possibility that a brighter, better trained and more affluent

mother might be more proficient in the discharge of parental responsibilities. I do, however, reject the contention that this fact would empower a state to dissolve a maternal relationship and to create an artificial one that the state might deem "more advantageous." Cf. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); In re Geiger, 459 Pa. 636, 331 A.2d 172 (1975). The example provided by the Nazi Germany Youth Camps should dissuade anyone who might be tempted to opt for such a sterile clinical approach to child rearing. The majority has totally disregarded the wisdom of Judge Woodside in Rinker Appeal, 180 Pa. Super. 143, 117 A.2d 780 (1955), wherein he stated:

A child cannot be declared "neglected" merely because his condition might be improved by changing his parents. The welfare of many children might be served by taking them from their homes and placing them in what the officials may consider a better home. But the Juvenile Court Law was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated, nor to take the children of the crude and give them to the cultured, nor to take the children of the weak and sickly and give them to the strong and healthy. Id. at 148, 117 A.2d at 783.³

3. Judge Woodside's (footnote continued 57a)

By its indifference to law and sound judicial caution, the majority has terminated the parental rights of a mother who did all she could with the few natural attributes that God gave to her.

In applying a statute, this Court must construe the words of the statute "according to their common and approved usage." Statutory Construction Act of 1972, Act of December 6, 1972, P.L. 1339, No. 290, § 3, 1 Pa. C.S.A. § 1903(a) (Supp. 1977-78). Turning to Webster's Third New International Dictionary, we learn that "incapacity" is the state of being incapable, i.e., lacking capacity, ability or qualification for the purpose or end in view. In the instant case, the majority itself states that appellant is "minimally capable" of caring for a child. In considering a question as momentous as the involuntary termination of parental rights, it is not semantic quibbling to point out that a parent who is minimally capable of caring for a child cannot also be, in fact and in logic, legally unqualified as a parent.

Section 311(2) requires not only a finding

(footnote 3. continued) caveat in Rinker Appeal, 180 Pa.Super. 143, 117 A.2d 780 (1955) arose in the context of an appeal from an award of custody. His warning should be accorded even greater weight in cases such as the instant one involving the irreversible termination of parental rights based upon an alleged parental incapacity.

of incapacity but also a showing that the incapacity resulted in an absence of parental care and control. Here the record indisputably reflects that Marjorie L. recognized her limitations and sought assistance from those public agencies available to her. Her continuing interest, love and affection for these children has never been questioned. At every opportunity she maintained communication to assure that their relationship would be sustained. If appellant were fortunate enough to have been financially able to solicit this assistance from private sources, the question of termination of her parental rights would never have arisen.⁴ It cannot

4. Financially secure parents suffering from the same mental or intellectual deficiencies as appellant Marjorie L. conceivably could hire nurses or seek the services of a private agency to aid in their childrearing. Thus, wealthy parents of families may avoid even the possibility of losing their parental rights. On the other hand, indigent parents similarly afflicted must seek aid from public agencies in order to provide for their children. It is indeed ironic that in seeking the only assistance available to them indigent involuntarily incapacitated parents expose themselves to the threat of losing the very reason for the quest for help -- their children. Such de facto discrimination on the basis of wealth should be considered by this Court when construing and applying the words of a statute. 1 Pa.C.S.A. § 1921(6) (Supp.1977-78). See note 8 infra.

be said that the mother's infirmities resulted in the children's deprivation of parental care, control or subsistence. Her only "sin" was to seek assistance from a public agency in providing these needs. Thus, in essence, the majority holds that where an indigent parent seeks the support of a public agency to assure assistance in obtaining adequate care for the child, the parent does so upon pain of being found to have been incapable of performing the duties of parenthood and subject to the termination of parental rights.

There is also no basis for finding that "the conditions and causes of the incapacity . . . cannot or will not be remedied by the parent." 1 P.S. § 311(2) (Supp.1977-78). In the instant appeal, the cause of appellant's supposed incapacity is her lack of intellectual talent or ability. However, the evidence does not support a conclusion that this cause cannot be remedied. To the contrary, there is expert testimony, summarized by the majority, that appellant's I.Q. scores placed her within the category of educable and trainable mentally retarded. A finding that the cause of appellant's incapacity cannot be remedied could only be sustained by ignoring the psychologist's testimony concerning appellant's capacity for training and education. Nor can it be concluded that the cause of appellant's incapacity will not be remedied. Appellant has, at considerable inconvenience, sought and received the assistance of Children's Services and nutrition aides in order to provide adequate parental care; appellant changed

her residence in order to improve her family's living conditions; appellant maintains an adequate and healthful dwelling; and she provides for her daughter's basic needs. The record shows that appellant was more than willing to seek the best possible environment for the rearing of her children and that she possessed sufficient capacity to perform the duties of parenthood. I am therefore of the belief that even without a consideration of the question of "fault" the clear language of section 311(2) does not provide a basis for termination under the instant record.⁵

Even more egregious, in my view, is the majority's position that the element of parental fault is not required by section 311(2). The majority construction of section 311(2) in effect means that an involuntary parental incapacity, sustained through no fault of the parent, if found to be irremediable, justi-

 5. The record in the appeal of Gladys B. presents a significantly distinguishable factual situation. Appellant Gladys B.'s refusal to cooperate with school counselors and nutrition aides and her open hostility toward caseworkers present a clearer case of an incapacity which "will not be remedied by the parent." Gladys B.'s obstinate unwillingness to accept the assistance offered is but one kind of parental misconduct which is a prerequisite to termination of parental rights under Section 311(2). I therefore concur in the result as to the appeal of Gladys B.

fies judicial termination of the incapacitated parent's parental rights. Such a construction raises serious equal protection questions which may very well render section 311(2) invalid.

The construction placed upon section 311(2) by the majority results in the creation of two categories of parents; one consisting of involuntarily incapacitated parents, either physically, mentally, or both, and the other consisting of basically healthy parents. As to those parents in the former category, the majority would apply section 311(2) to terminate their parental rights, whereas those parents in the latter category would not face such a threat without some dereliction on their part. By this judgment they have ordained that the bedridden terminally ill cancer patient, the comatose accident victim, the paralytic, and the contagiously ill patient are all prime subjects for involuntary termination under this section.⁶

6. We who sit as appellate judges must always guard against becoming emotionally isolated from human nature and the human consequences of our decisions lest in our endeavors to render dispassionate justice we lose our compassion. Kafka, in describing judges in a fictional judiciary, wrote:

" . . . yet confronted with quite simple cases, or particularly difficult cases, they were often utterly at a loss, they did not have any right understanding of human relations, (footnote continued 62a)

It is conceded that there are literally hundreds of legislatively created classifications and that the constitutional guarantee of equal protection does not operate as a *per se* prohibition of such classifications. The traditional equal protection standard required only that the differentiation in treatment created by a classification bear some reasonable relationship to a legitimate legislative objective. See e.g., Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring). See generally, G. Gunther, Constitutional Law 657 (9th ed. 1975). However, where a statutory classification affects a fundamental interest, equal protection requires that the statutory classification be necessary to promote a compelling state interest. See Kramer v. Union Free Sch. Dist., 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583

 (footnote 6. continued) since they were confined day and night to the workings of their judicial system, whereas in such cases a knowledge of human nature itself was indispensable."

F. Kafka, The Trial 148-49 (M. Brod ed. 1969). One cannot ignore the human result of the majority's decision today. In the words of Mr. Justice MANDERINO in his dissent in the instant case, Frank, William and Mark are dead so far as appellant is concerned.

(1969) (right to vote). Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right of interstate travel). The cornerstone of the parental relationship is the natural love that exists where it is properly nurtured by the parent. In the panoply of duties and responsibilities that comprise the obligations of parenthood, nothing is more important than the fostering of the love that can exist between parent and child. No experience in life is more gratifying and significant in the development of the child than to have been the recipient of parental love. The warmth and the security of that love dwarfs the incidental benefits that riches, luxury and power may provide. The societal importance of the parental relationship explains, if such explanation is needed, why the United States Supreme Court has consistently held that the right of natural parents to raise their own offspring is a fundamental interest and thus subject to the highest degree of constitutional protection. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); see Pierce v. Society of Sisters, *supra*; Meyer v. Nebraska, *supra*. Since the classification drawn by the majority's construction of section 311(2) directly impringes upon involuntarily incapacitated parents' rights to the companionship, care and custody of their children, only a compelling state interest can justify the classification. I have grave doubts that the state's admittedly valid interest in protecting minor children is sufficiently powerful to legiti-

mize the classification.⁷ Furthermore, I would submit that even if this state interest is considered to be a "compelling" one, there are less drastic alternatives available (e.g., continued foster home care), short of absolute termination of parental rights, to promote this state interest.⁸ The state's interest is

 7. Since, as the majority correctly notes, the appeal of Marjorie L. does not involve any parental misconduct, the "abuse, neglect, or refusal" language of section 311(2) was not a basis for the majority's holding.

8. I have already discussed the potential for de facto discrimination on the basis of wealth created by the majority's construction of section 311(2). See note 4, supra. I now point out that such a wealth-based classification also raises an arguable equal protection question. It must be conceded that the Equal Protection Clause has not been judicially accepted as a means of redressing all economic inequalities. Compare San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Texas system of financing public education upheld in face of equal protection attack) and Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (denial of appellate counsel to indigent criminals held unconstitutional, but opinion unclear as to whether holding relied upon due process or equal protection). Nevertheless, in interpreting a statute, this Court should consider the consequences, both legal and practical, of its interpretation.
 1 Pa.C.S.A. § 1921 (footnote continued 65a)

that of insuring that the essential needs of the child are met. In cases involving no parental misconduct, such as the instant case, this interest is sufficiently promoted by custody awards.

I need not reach the ultimate merits of the constitutional issues discussed above, because in my judgment the appropriate construction of section 311(2) avoids constitutional problems. In concluding that the incapacity provisions of section 311(2) do not require any showing of parental fault, the majority relies upon the Joint State Government Commission, Official Comment, Adoption Act (1970). It is, of course, permissible for this Court to consult such comments in construing a statute. 1 Pa.C.S.A. § 1939 (Supp.1977-78). However, in construing a statute, this Court should also consider the consequences of a particular interpretation and should presume that the legislature did not intend that a statute be construed in a constitutionally questionable manner. 1 Pa.C.S.A. §§ 1921(6), 1922(3) (Supp.1977-78). While the words, "incapacity" and "cannot", when read in conjunction in a purely literal sense, could support the construction urged by the majority, it is my view that such a construction is foreign

(footnote 8. continued) (6) (Supp.1977-78). Certainly there is no justification for a construction, not absolutely required by the language of the act, which would create such a blatant disparity between the rich and the poor.

to the American philosophy of the relationship between the State and the citizen and is totally unwarranted. The majority's no-fault interpretation of the incapacity provisions of section 311(2) permits the termination of the parental rights of parents who, without any fault, are rendered unable to care for their children. In light of this consequence and the attendant constitutional difficulties, I suggest that some degree of parental fault be a prerequisite to a termination on grounds of incapacity. The "abuse, neglect, or refusal" language of section 311(2) shows that parental misconduct was a primary concern of the legislature. Furthermore, in providing for termination when an incapacity "will not be remedied by the parent", the legislature clearly intended that the willful refusal of parents to take steps to remedy their own incapacity would constitute grounds for termination. Thus, the element of fault, or parental misconduct, permeates section 311(2). Since the state has a much stronger interest in protecting minor children from willful or even negligent parental misconduct, the statutory interpretation I proffer is essential if section 311(2) is expected to withstand an equal protection attack.

I therefore dissent as to the termination of parental rights of appellant Marjorie L., and I concur in the result as to the termination of parental rights of appellant Gladys B.

MANDERINO, Justice, dissenting.

I must dissent. The majority holds that the state may constitutionally terminate the parental rights of a parent if that parent, without fault, is incapacitated, and the incapacity prevents the parent from taking care of the parent's children. The state does not have such a dangerous and far-reaching right over its citizens. Suppose a parent is incapacitated, without fault, as the result of an automobile accident, or a heart attack, or an injury received during a war? Under the majority's holding, if such a parent cannot take care of his or her children, the state may terminate parental rights. To state the issue is to answer it. The state can constitutionally have no such right.

We are in this case concerned with custody. Of course, if a parent is incapacitated, a benevolent and protective state may help that parent by providing care for the children outside of the parent's custody. The termination of parental rights, however, means that the child is dead so far as that parent is concerned. I cannot, as does the majority, make a valued judgment that a child will grow up to be a better adult if that child is cut off from its natural parents who are not able, without fault, to care for the child.

IN THE COURT OF COMMON PLEAS

OF LYCOMING COUNTY, PA.

ORPHANS' COURT DIVISION

IN RE:	:	
	:	
WILLIAM LEHMAN	:	
MARK LEHMAN	:	No. 2986
FRANK LEHMAN,	:	2987
	:	2988
MINOR CHILDREN.	:	

Findings, Discussion & Order

Before the court are petitions to involuntarily terminate the parental rights of Marjorie Lehman with respect to three of her children and petitions to voluntarily relinquish the parental rights of the fathers of each of the same three children. After hearing, the court makes the following findings of fact:

The three children involved in this proceeding were voluntarily placed in the custody of the Lycoming County Children's Services Agency on June 8, 1971, as a result of an investigation by that agency into the roach and rat infested conditions of the home. The children are Frank, age 12, date of birth December 22, 1963 (7 years old at time of placement); William, age 10, date of birth November 22, 1965 (5 years old at time of placement); and Mark, age 6, date of birth October 8, 1969 (1 year old at time of

placement).

The fathers of the children are Richard L. Smith (as to Frank), William Tawney (as to Mark), and Charles Morgan (as to William).

The mother is Marjorie Lehman, age 43, date of birth September 18, 1932. She has never been married and has two other children. The oldest, Carol, age 15 years (date of birth-September 30, 1960), has lived with Marjorie Lehman's parents for many years and there are no plans for her ever to return. The other child, Tracie Ann Lehman, is four years old, having been born on September 1, 1971. Marjorie was pregnant with Tracie at the time, Frank, William and Mark were placed in the Children's Services agency. The mother has custody of Tracie and appears to be able to handle her custody at this time. The mother functions socially at the twelve year level and intellectually at the age of six years, ten months. She went as far as the seventh grade of school and is illiterate.

At the time of the placement of the children with the Agency in June, 1971, the Agency's plan with respect to the children was to seek their return by helping the mother to obtain adequate housing, by providing nutrition aids to counsel her and by waiting for her circumstances to stabilize after the birth of the baby she was carrying.

Since 1971, nutrition aids have regularly visited the home and have attempted to assist Marjorie Lehman in coping with the complex-

ities of life. They have found that Miss Lehman has repeatedly been in need of and in fact has constantly solicited their advise as to some of the more simple problems in day to day living. At one time Tracie Ann was not permitted to go to school because she had lice. The supervising nutrition aid had great difficulty explaining to Miss Lehman the procedures necessary to rid the child of the problem; in the end, the supervisor had to perform the process herself in order that the child would be able to return to school. Nutrition aids have observed that on the days when Miss Lehman receives her S.S.I. checks (her sources of income), a bill collector will come to her home - she will give him the check and he will return later, having cashed the check and deducted whatever debts might be due.

The mother began to request the return of the children in November of 1974, but the Agency felt that she was simply incapable of dealing with these active young boys. In December of 1975, with the assistance of a legal aid attorney, she petitioned for custodial visits with the children. These visits have been occurring since that time and by observation of caseworkers and aids present during different visits, the visits have consisted of general havoc or "free-for-alls"; as the mother attempted to attend to one child, the others were running wild. The older boys were observed to "tolerate their mother" and the youngest boy who has been away from home since age one, appeared unable to relate emotionally with the mother and

his brothers and simply watched television.

The mother, by virtue of her income and having a child, finds it necessary to live in a low income project area, where social problems are most intense and where the demands upon a parent in properly supervising and disciplining his children are most extreme.

The children are healthy, active, alert youngsters. The mother would not be able to provide intellectual or social stimulation for them, nor would she be able to channel and discipline their behavior.

Section 311 of the Adoption Code provides:

"The rights of a parent in regard to a child may be terminated after a petition filed pursuant to section 312, and a hearing held pursuant to section 313, on the ground that: . . .

(2) The repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent; . . . "

The standard of proof required to involuntarily terminate parental rights is clear and convincing evidence. Geiger Appeal, ____ Pa. ____ 331 A 2d 172 (1975).

There is no question that Marjorie Lehman loves her children and would like to see them return. The court is also satisfied that the older two children, Frank and William, remember their mother and have affection for her. However, it is absolutely clear to the court that, by reason of her very limited social and intellectual development combined with her five-year separation from the children, the mother is incapable of providing minimal care, control and supervision for the three children. Her incapacity cannot and will not be remedied.

If the termination petition is granted, the children will be eligible for adoption and will have the prospect of a stable and permanent relationship with a father and mother. If the petition were denied, the best interests of the children would dictate that they remain in agency custody indefinitely, as the mother will never be capable, in our judgment, of resuming custody. The choice is between the limbo of continuing fosterhood and the potentiality of a normal parent-child relationship.

The petitioner has met its burden of proof in this matter and the parental rights of Marjorie Lehman will be terminated with respect to Frank, William and Mark Lehman.

The court considers the argument that Section 311 of the Adoption Code is unconstitutionally vague, to be without merit. The legislation fairly puts the parent on notice that parental rights can be terminated where there is an abandonment or refusal to provide,

or incapability of providing, essential parental care. It would be impossible to set forth in the statute all of the circumstances which might arise in an infinite variety of factual circumstances constituting lack of essential parental care. The legislative approach, which is not at all uncommon in Anglo-American jurisprudence, is to use a general standard which has a commonly accepted meaning and which is susceptible of application by the courts as cases arise, in the common law tradition.

Decree Nisi

AND NOW, June 3rd, 1976, for the reasons set forth in the foregoing Findings and Discussion, it is Ordered and Decreed that the parental rights of Marjorie Lehman with respect to her children, Frank, William and Mark are terminated. The parental rights of Richard L. Smith as to Frank, Charles Morgan as to William, and William Tawney as to Mark, are relinquished and forever terminated. The children are eligible for adoption. Unless exceptions are filed to this Decree within twenty (20) days of the date hereof, a Decree absolute shall be filed.

By The Court,
(signed)

Thomas C. Raup, Judge

cc: L.C. Children's Services
Warren R. Baldys, Jr., Esq.
Charles F. Greevy, III, Esq.
Marjorie Lehman

IN THE
Supreme Court of the United States

Supreme Court, U. S.

FILED

JUL 26 1978

EL RODAK, JR., CLERK

OCTOBER TERM, 1977

No. 77-1704

Marjorie Lehman,

Petitioner

— against —

Lycoming County Children's Services, et al.,

Respondent

RESPONDENT'S BRIEF
IN OPPOSITION TO PETITION FOR CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

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Attorney for Respondent
Lycoming County Children's Services

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<u>Wisconsin vs. Yoder, 406 U.S.</u> <u>205, 92 S. Ct. 1526, 32 L. Ed.</u> <u>2d 15(1972).....</u>	13
<u>Young, Adoption of, 364 A.2d</u> <u>1307, 469 Pa. 14(1976).....</u>	10

Statutes:

1 C.P.S. §311(2).....	2,4,6,11
11 P.S. §50-101, et seq.....	5
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IN THE
SUPREME COURT OF THE UNITED STATES
NO. 77-1704

MARJORIE LEHMAN,
PETITIONER

vs.

LYCOMING COUNTY CHILDREN'S SERVICES,
et al.
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

The Respondent, Lycoming County Children's Services, respectfully prays that the Writ of Certiorari to the Supreme Court of Pennsylvania, sought by Petitioner, Marjorie Lehman, be denied. The text of the decision of the Pennsylvania Supreme Court is reported as follows: In Re: William L., 383 A.2d 1228 (Pa. 1978), and is set forth at length in Petitioner Marjorie Lehman's petition, Appendix, pages 1a to 67a. The text of the Orphans' Court decision is contained in Petitioner's Appendix, pages 68a to 73a.

COUNTERSTATEMENT OF THE CASE

On June 3rd, 1976, the Lycoming County Orphans' Court entered an Order involuntarily terminating Marjorie Lehman's parental rights to her three (3) sons pursuant to the Pennsylvania Adoption Act of 1970, 1 Pa. Statutes, §311(2) (Lehman Petition, page 3). Petitioner had placed her three (3) boys in the care and custody of the Respondent in June, 1971, when they were respectively 1, 5 and 7 years of age, and they have not resided with her since that time. Petitioner's oldest child Carol, born 9/30/60, has resided with the Petitioner's parents for many years and there is no plan for her return to Marjorie Lehman's home.

After the birth of Petitioner's youngest daughter, Tracie, in September, 1971, Marjorie Lehman, by her own decision chose an apartment in which she still resides, which she acknowledges is not adequate for return of her three (3) boys. Additionally, several Lycoming County Social Service Agencies worked with Marjorie Lehman from January, 1971 through the time of the Orphans' Court hearing in the spring of 1976. These included nutrition aides who were in her home at least monthly for the five (5) year period, stressing and educating her in regards to proper food menus, nutrition guidelines, budgeting, and every-day problems and concerns. (Orphans' Court Transcript hereinafter O.C.T., pages 55 to 59.) The nutrition aides and supervisor stated from their observations that

Marjorie Lehman would not be able to physically or emotionally take care of all of her children (O.C.T., page 58).

There was extensive testimony at the Orphans' Court hearing by Dr. Jacqueline B. Sallade, a psychologist, concerning evaluations that she had done with Marjorie Lehman in January, 1976. Dr. Sallade found that Marjorie Lehman "was socially functioning in terms of self-help skills and independent skills at about the twelve (12) year level, and that intellectually, ... at the level of a six (6) year old child." (O.C.T. page 31.) Observation of Marjorie Lehman during times of visitations with her boys, consisted of general havoc or "free-for-alls", and even the older boy acknowledged that his mother could not and would not be able to control the boys' actions. (O.C.T., page 127)

The Orphans' Court terminated the parental rights of the natural mother to the three (3) boys. This decision was affirmed by the Pennsylvania Supreme Court in a wide-ranging review and decision based upon the natural mother's repeated and continued incapacity which could not be remedied, that caused the boys to be without essential parental care or control necessary for their physical and mental well-being. The Pennsylvania Supreme Court recognized the State's constitutional interest in the welfare of a child, and rejected Petitioner's argument that the Pennsylvania statute required a showing of a high and substantial degree

of misconduct. (In re: William L., 383 A.2d at 1236, Petitioner's Appendix page 19a)

ARGUMENT

REASONS FOR DENYING THE WRIT

1. SECTION 311(2) OF THE PENNSYLVANIA ADOPTION ACT IS NOT UNCONSTITUTIONALLY VAGUE NOR DOES IT VIOLATE SUBSTANTIVE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

The Pennsylvania Supreme Court speaking through Justice Samuel J. Roberts, writing for the majority, deals directly with the arguments advanced by Petitioner in the lower and Supreme Court, and in her Writ to this Court. A reading of the Pennsylvania Supreme Court's decision contains the strongest arguments for denial of the Writ of Certiorari prayed for in Marjorie Lehman's petition.

Section 311(2) of the Pennsylvania Adoption Statute allows termination of parental rights for children whose essential needs have not been met, based upon facts as presented showing that the needs cannot or will not be met by a parent. The Pennsylvania Supreme Court deals at length with the manner in which a vague statute may offend the Constitution, as enunciated in the cases of Grayned vs. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), and Alsager vs. District Court of Polk City, Iowa, 406 F. Supp. 10 (S. D. Iowa 1975), aff'd in part, 545 F. 2d 1137 (8th Cir. 1976).

(See In re: William L., 383 A.2d at 1232; Lehman Appendix, pages 4a and 5a) The Pennsylvania Statute withstands this vagueness attack.

Justice Roberts specifically excludes the possibility that insufficient notice is present since the parent's inability or unwillingness must be affirmatively demonstrated and the causes be irremediable. (In re: William L., 383 A.2d at 1232-33; Lehman Appendix page 6a and 7a). Secondly, the concern for arbitrary and discriminatory enforcement is negated by a State's right and duty to protect its weaker members, such as infants, and the legislature's policy protecting the family as reflected in the Pennsylvania Juvenile Act as well as the Adoption Act. (Pa. Juvenile Act of 1972, 11 P.S. §50-101; In re: William L., 383 A.2d at 1241; Lehman Appendix, pages 31a and 32a.) The Pennsylvania Court emphasises landmark and recent Supreme Court decisions that a child living in his own home will not be removed, as long as his essential needs are being met. (See In re: William L., 383 A.2d at 1234-35; Lehman Appendix, pages 12a to 15a). Thirdly, the Pennsylvania Court rejected the argument that First Amendment values were violated by the statute, in that the Court is speaking to "essential" and "necessary" needs of the child which are not being met. In re: William L., 383 A.2d at 1234; Lehman Appendix, page 11a; see also, In re: Geiger, 331 A.2d 172, 459 Pa. 636 (1975).

A. A SHOWING OF SERIOUS HARM IS NOT NECESSARY IN THE PENNSYLVANIA TERMINATION STATUTE FOR THE STATE TO INVOKE ITS COMPELLING INTEREST TO PROTECT A CHILD.

Petitioner would require that a state show that serious harm, through a "high and substantial degree of misconduct" by a parent would be necessary prior to the Court ordering termination of parental rights. This argument was specifically submitted and argued before the Pennsylvania Supreme Court. The Court rejected this argument, with due regard to firm Supreme Court decisions, and its own determinations. (See In re: William L., 383 A.2d at 1236-37; Lehman Appendix pages 17a to 19a.) As Justice Roberts points out, "this contention was expressly rejected in In Adoption of R. I., 361 A.2d 294, 468 Pa. 287 (1976)" (In re: William L., 383 A.2d at 1237; Lehman Appendix, page 19a)

The section of the Pennsylvania Statute attacked herein, 1 C.P.S. §311(2), as interpreted by the Pennsylvania Courts allows parental rights to be terminated entirely without regard to usual concepts of willfulness or fault on the part of the parent, and deals with those who cannot care for a child, as well as those who will not. It is well recognized that the responsibility of performing parental duties can be met when reasonable arrangements are made for the temporary care of a child; however, the true test and inquiry of a Court is whether a parent has utilized those resources at her command in overcoming obstacles which temporarily

preclude personal supervision of the child's welfare. In re: Howard, 360 A.2d 184, 468 Pa. 71 (1976); In re: Cassen, 326 A.2d 377, 457 Pa. 525 (1974); McCray Adoption Case, 331 A.2d 652, 460 Pa. 210 (1975).

A closely analogous Court proceeding involving children, is that of primary custody. The Pennsylvania Superior Court has enunciated the different burdens of proof of "best interest" and "clear necessity", and measures these standards with the purposes of the Pennsylvania Juvenile Act in preserving the natural family whenever possible. See Interest of LaRue, 366 A.2d 1271, 244 Pa. Super. 218 (1976); In Interest of Clouse, 368 A.2d 780, 244 Pa. Super. 396 (1976). A Court in a custody matter must look to factors (such as age and mental development of a child, extent and nature of relationship with a parent, extent and degree of relationship with foster parents, and passage of time) necessary to provide for the care and protection, and wholesome mental and physical development of the child, both immediately and in the future. Interest of LaRue, 366 A.2d at 1277, 1278. In this Lehman termination matter, one of the measuring sticks for evaluating the capacity of the mother is the interaction with the boys, especially as shown at the visitations (O.C.T. at pages 29, 67, 77, 79, 81), to assess the vitality and depth of the remaining relationship between the natural mother and each boy.

Based on the foregoing framework of applicable law on the burden of proof and

the factors which enter into an analysis of capacity and control of a natural parent, let us look to the facts adduced at the Orphans' Court Lehman termination hearing. Dr. Sallade, in interpreting the results of the various tests that she gave to the natural mother, questioned her adequacy in basic housekeeping tasks, such as cooking and cleaning, and of her discipline methods. (O.C.T. at pages 33, 34, 46). The mother's functioning level of twelve years, six months, mental age of six years, and ratio IQ of forty-three, (O.C.T. at pages 34, 35) raise serious questions of her maturity to handle a household and family of more than one small child. The Nutrition Aides expressed serious reservations of her ability to handle money (O.C.T. at pages 58, 62, 68, 73), to provide proper health care, as seen by the lice incident (O.C.T. at pages 57, 61, 68), and to take care of all of the children (O.C.T. at pages 58, 70, 71). When discussing the boys, the mother exhibited a lack of knowledge or concern in their present school status and hobbies (O.C.T. at page 106), and of their respective ages and emotional development (O.C.T. at page 107).

The testimony and record in this particular matter reveals that the natural mother, Marjorie Lehman, placed the three (3) boys in the custody of the Children's Service Agency approximately five (5) years before the termination hearings were held in May, 1976; that since the placement, all of the children have remained in the custody of the agency in foster homes; that at the time of the

placement of the three (3) boys, the mother was unable to provide essential parental care and subsistence necessary for their physical and mental well-being; that she has known that better housing and necessity of proper care and control of the boys was essential for their return; that she has been unable to or failed to make progress towards doing so; that the causes of her inability or failure to achieve these goals and standards are primarily her very limited intellectual capabilities, her lack of skills essential to the rearing of the children; a lack of initiative or ability to progress in programs or opportunities which provide such skills; and that she lacks the capacity to even recognize the need of emotional and intellectual stimulation for the boys. Surely, emotional and mental deprivation and injury may be as crippling to a young child in his formative and teenage years as physical abuse and neglect. Herein, lies the crux of the evidence in the Lehman terminations.

The Orphans' Court was dealing specifically with three (3) active and healthy boys, who had been in foster homes for five (5) years, and evidence which showed a lack of parental capacity to deal with the boys' needs, particularly in regards to intellectual or social stimulation. Herein, the evidence points directly to the mother's mental retardation and a physical incapacity to control the boys' behavior. (Lehman Appendix page 72a). The conclusion of the Pennsylvania

Courts based on competent and the compelling weight of the evidence adduced, proves a repeated incapacity and inability to presently or in the future provide essential parental care and control necessary for Frank, William, and Mark Lehman's physical and mental well-being. Respondent urges that under the brief synopsis of the facts recited above, no further review by this Court is warranted or necessary.

Petitioner next argues that the Pennsylvania Supreme Court is advancing a "best interest" approach in upholding the Orphans' Court termination of the parental rights. Petitioner, Gladys Beatty, advanced this same argument in her petition to this Court, to October Term 77-1703. Therein, Respondent argued that both the Orphans' Court and the Pennsylvania Supreme Court found precise grounds for parental rights termination, and did not rely upon the best interest considerations. The line of Pennsylvania termination cases prove that Pennsylvania's Supreme Court has been cognizant that prior to the interest of the children being considered, a definite grounds for involuntary termination must be proven by a preponderance of the evidence. (See In re: Adoption of R. I., Supra; Adoption of Young, 364 A.2d 1307, 469 Pa. 14 (1976); Matter of Kapcsos, 360 A.2d 174, 468 Pa. 50 (1976)). Conversely, several states are considering and Colorado has recently adopted a termination statute stressing, inter alia, a "best interest" factor. (See Colorado's "Parent-Child Legal Relationship Termination Act of

1977", Colo. Rev. Statutes, Ann., §19-11-101, et seq.) This change is through legislative action and is respected by the Pennsylvania Court in our matter. (In re: William L., 383 A.2d at 1236; Lehman Appendix page 18a.) (See also, Alsager, Supra. at 406 F. Supp. at page 19). Respondent urges that the well-reasoned and thorough opinion by the Pennsylvania Supreme Court supports the determination that a compelling state interest was proven to sustain the Lehman terminations.

B. PENNSYLVANIA TERMINATION STANDARD IS NOT VOID FOR VAGUENESS.

Petitioner's allegations that §311(2) of the Pennsylvania Adoption Act is unconstitutionally vague are without merit. The same argument was raised by Petitioner Gladys Beatty in her petition to this Court, to October Term 77-1703, and the Court is referred to the Respondent's arguments contained in its brief in opposition. (See Respondent's Brief in Opposition, 77-1703, pages 9, 10, 11 and cases cited therein.). Further, Justice Roberts analyzed the Pennsylvania statute against this vagueness challenge through appropriate cases and treatises. (In re: William L., 383 A.2d at 1233-34; Lehman Appendix pages 7a to 10a.) Even petitioner acknowledges that some latitude is necessary in a state's interest in protecting its children (Lehman Petition page 13); the question arises in the case-by-case application of those standards. (See Appendix herein, page 22.)

In Grayned vs. City of Rockford, Supra, this Court suggests that standards that may be seen as vague in a statute may be safe from a constitutional challenge if the needed specificity has been supplied by other decisions of a State Supreme Court. This thinking is quoted with favor in Alsager, 406 F. Supp. at 19. This is what the Pennsylvania Supreme Court has done, as specifically set forth in its decision, and even discussing the same cases that troubled Petitioner herein. (Compare Petitioner Lehman's Petition at page 14, with In re: William L., 383 A.2d at 1239, 1240, 1242-43 (footnote 25), 1246; and Lehman Appendix, 27a to 29a, 37a (footnote 25), 38a, 48a, 49a.)

The "high and palpable degree of harm" to children deemed essential for termination in the cases of Adoption of R. I., Supra, In re: Geiger, Supra, and In re: Brandl, 339 A.2d 759, 462 Pa. 181 (1975), were strongly supported by the testimony at the Orphans' Court hearing (Respondent's Argument I-A, Supra), and the thorough review and recital in the majority opinion. The vagueness argument of Petitioner Lehman is overcome, refuted and forms no basis for a Writ of Certiorari to be issued.

C. A STATE IS NOT CONSTITUTIONALLY REQUIRED TO REJECT TERMINATION OF PARENTAL RIGHTS, IF OTHER ALTERNATIVES ARE AVAILABLE, WHEN GROUNDS FOR TERMINATION HAVE BEEN PROVEN.

The Petitioner next argues that even if a parent is shown to be positively and

permanently incapable of meeting the essential needs, both physical and mental, of a child, the state has an obligation to continue the parental relationship, and to provide a less drastic method of caring for the children. This overlooks the increasing Court decisions that hold that parents and children are equal in their right to the satisfaction of a permanent and sustaining family life, and that they are also equal in their rights to life, liberty and the pursuit of happiness. The Petitioner's argument would continue an ill-advised presumption that children are the property of their parents. Justice Roberts, speaking for the majority quoted with favor, Mr. Chief Justice Burger's statement in Wisconsin vs. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972):

To be sure, the power of the parent even when linked to a free exercise claim, may be subject to limitation...if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burden." Id. 406 U.S. at 233-34, 92 S. Ct. at 1542; see also, Moore vs. City of East Cleveland, Ohio, 431 U.S. 494, 499, 97 S. Ct. 1932, 1936, 52 L. Ed. 2d 531 (1977). In re: William L., 383 A.2d at 1234; Lehman Appendix, page 11a.

The Pennsylvania Court while acknowledging that parental rights must be

accorded significant protection, as interpreted by this Court, also reiterates that these parental rights must yield to a child's essential health and safety needs, and the state may intervene to protect its weaker members, such as infants. (In re: William L., A.2d 1236; Lehman Appendix pages 16a and 17a).

Marjorie Lehman would have this Court sanction a continuing foster placement of all three (3) boys, and in particular Frank, the oldest, rather than have them legally adopted into a stable home setting. Petitioner misstates Frank's status on page 16 of her Petition, in that this oldest boy, was "considered to be unadoptable by the agency"; rather, initial discussions with his foster family at the time of the hearing indicated that they did not feel they personally could adopt Frank at that point (O.C.T. pages 24 and 25).

The caution by which the Pennsylvania Supreme Court approaches its review of termination cases is straightforwardly reflected In re: Brandl, *Supra*, as the per curiam order therein states:

"Decree vacated and case remanded for an evidentiary hearing and to make appropriate findings of facts after ascertaining the competency of Dorothy Brandl and to establish a current record and ascertain the preferences of the children..."
Id., 339 A.2d at 759; (See also,

Jones Appeal, 297 A.2d 117,
449 Pa. 543 (1972).)

The Pennsylvania Supreme Court, as did the Orphans' Court explored the various alternatives prior to ordering the full termination of Marjorie Lehman's parental rights.

The three (3) Lehman boys were interviewed by the Orphans' Court on the record in May, 1976, and in the presence of the attorney for each party. William, then age 10, and Frank, then age 12, expressed love for their natural mother, but minimal concern that there would be no further visitation if the termination were granted; the youngest, Mark, age 6, appeared to have little or no emotional attachment to his mother. It is difficult to determine whether the expression of the two older boys represents a real desire on their part to maintain a relationship with their natural mother, pointing towards an eventual return; or whether, on the other hand, these expressions represent a grasping on the part of the children to maintain a permanent seat in their family status, a need and desire that could be satisfied by the eventuality of adoption for all of these boys.

The majority opinion acknowledged the continuing efforts by the Respondent-Agency directly in Marjorie Lehman's home, particularly through the nutrition aides, to improve the circumstances of her home and daily needs. In re: William L., 383 A.2d at 1242; Lehman Appendix Page 36a and 37a.

An interesting aspect of this matter is revealed in the discussion in regards to the oldest Lehman Child, Carol (O.C.T. at pages 112 to 114), who has resided with her grandmother since March 20, 1969. This consideration is a very revealing factor in that the natural mother has made no effort to regain custody of her or even to arrange or maintain any visitation with her, although she lives about twelve (12) miles away. Indeed, the natural mother stated at the hearing that she had not seen Carol since Thanksgiving, 1975. (O.C.T. at page 113). This is measured by the realization that visitation with the three (3) boys has been Children Service arranged, scheduled, and regulated, even including transportation and supervision of the visitation in her home. The mother has never been able to provide adequate housing for return of the boys, and has never formally attempted to regain custody of any of the boys. The core question remains whether these three (3) boys should remain in foster care for the balance of their minor lives, or whether the parental rights of the natural mother be terminated so that they can be adopted into a stable and legally recognized relationship.

2. THE WRIT OF CERTIORARI SHOULD BE DENIED IN THAT THERE IS NO GROWING CONFLICT AMONG JURISDICTIONS OF THE CONSTITUTIONAL LIMITS UPON STATES IN TERMINATING PARENTAL RIGHTS.

Petitioner avers a conflict among several states, who are speaking to the

"best interests" of the child rather than supporting basic findings of parental neglect and incapacity. Indeed, Petitioner urges that the Pennsylvania Supreme Court in this case has ignored and applied inconsistently their previous standards. Respondent emphasizes that rather than being in conflict with decisions from other jurisdictions, the Pennsylvania Supreme Court has set forth in detail in its decision the legislative basis and court interpretation appropriate in the Pennsylvania termination decisions. Additionally, there is no legitimate potential for conflicting interpretation of involuntary termination cases when this Court's decisions in the Smith vs. Offer, 53 L. Ed. 2d 14 (1977) and Quillon vs. Walcott, 54 L. Ed. 2d 511 (1978), cases are examined. The "unfitness" necessary is clearly enunciated in the Lehman facts. This particular decision of the Pennsylvania Supreme Court under attack is consistent with previous Pennsylvania termination cases, and in line with the demanding degree of proof necessary. In re: Geiger, Supra. The "compelling state interest" recognized herein is the "state's responsibility to protect its weaker members" and the Pennsylvania Court evaluates this foundation through appropriate United States Supreme Court decisions. (In re: William L., 383 A.2d at 1236; Lehman Appendix 16a. to 18a.)

Two recent cases from other jurisdictions help buttress the decision of the

Pennsylvania Supreme Court in this case. In McGowen vs. State, 558 S. W. 2d 561 (Texas, 1977,), the Texas statute allowing termination was found not violative of due process, when the main allegation against the natural parent was a failure to provide monetary support. Also in the Matter of Prentice, 570 P. 2d 419 (Oregon 1977), there again was no violation of due process guarantees, when the main issue was the mental capacity of the natural mother of a young child in a termination matter. These cases support the interpretation and determination made by the Pennsylvania Supreme Court in this matter. This Court is also referred to the discussion of the Alsager decision contained in Respondent's arguments in opposition to Gladys Beatty's petition. (Respondent's Brief, pages 4 and 5, in Number 77-1703).

As quoted in the Pennsylvania Supreme Court case, a Court must consider a number of factors in determining whether or not parental rights should be terminated. Even its custody and deprivation standards, the primary focus of the Pennsylvania Juvenile Act, (See In re: William L., 383 A.2d at 1240, 1241, and Lehman Appendix at 31a, 32a,) is to preserve the unity of the family, and separate the child from the parent only when necessary for the welfare or in the interest of safety of the child. The Court in considering whether or not parental rights should be terminated, should and in this instance did evaluate what services had been provided to the parent to bring about a reunion with the

children, and the success of the services. As revealed by the Orphans' Court transcript, the same caseworker from the Respondent-agency worked with Marjorie Lehman from the time of the placement of the three (3) boys in June, 1971, up to the termination proceedings in May, 1976. Additionally, nutrition aides worked with the Lehman family from January, 1971, to 1976, and the Petitioner has been legally represented by the same staff of Legal Service attorneys since mid-1974. There can be no legitimate charge that the Agency's motives and actions were circum-spect or highly subjective.

The Pennsylvania Supreme Court was fully satisfied that Agency Services were made available over several years to the parent to help remedy the causes of removal, which proved unavailing. In re: William L., 383 A.2d, footnote 5, at pages 1232-33; Lehman Appendix pages 6a-7a. Herein, we are dealing with and evaluating an unmarried natural mother of five (5) children, who is illiterate, uneducated, of very low and limited mental ability, who displays a lack of physical control and discipline over the three (3) boys involved in this Petition. A decisive point in this case is the testimony of the psychologist who directly addressed the mental capacity and several parenting skills of the natural mother. Dr. Sallade, the psychologist, confirmed in January, 1976, the thinking of Ann Russell, the caseworker since June, 1971, and the experiences of the nutrition aides, that the natural mother lacked the

ability to control and to provide for the return of full custody of the boys. We have the fundamental finding of the lower Court that "by reason of her very limited social and intellectual development combined with her five (5) year separation from the children, the mother is incapable of providing minimal care, control and supervision for the three (3) children. Her capacity cannot and will not be remedied." (Lehman Appendix 72a.) The primary purpose of this termination proceeding is for the three (3) boys to be given the opportunity to accept and be accepted into stable and full home environments.

The growing number of foster children is not a product of unwary courts or unexpeditious state agencies, at least not in Pennsylvania. These institutions and throughout the nation, must look to the legislatures for their guidelines and mechanisms, as long recognized by this Court. Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 2385-86, 53 L. Ed. 2d 484 (1977); Missouri, Kansas and Texas Railway Company v. May, 194 U.S. 267, 24 S. Ct. 638, 639, 48 L. Ed. 971 (1904). These termination decisions from the Pennsylvania Court, do not foretell a "growing conflict", but remain on solid judicial and constitutional ground, when placed on the gridwork of the facts presented to the Orphans' Court of Lycoming County, Pennsylvania.

CONCLUSION

IN SUMMARY, it is submitted that sufficient due process procedures and standards have been and can be applied in the proper analysis of grounds of the involuntary termination in this matter, leading to an eventual adoption, to overcome any argument of the constitutionality or vagueness of section 311(2) of the Pennsylvania Adoption Statute, which is not in conflict with decisions from other jurisdictions.

WHEREFORE, Respondent prays that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

The Pennsylvania Supreme Court has defined in long-standing cases the obligations of a parent. An oft-quoted case which has application in our matter is that of Smith Adoption, 194 A.2d 919, 412 Pa. 501 (1963), wherein it is stated:

"Parental rights may not be preserved by complete indifference to the daily needs of a child or by merely waiting for some more suitable financial circumstances or convenient time for the performance of parental duties and responsibilities (while others adequately provide the child with her immediate and continuing physical and emotional needs). The parental obligation is a positive duty and requires affirmative performance which may not be delayed beyond the statutory period by the parent if the parental right is not to be forfeited." Id., 194 A.2d at 922, 412 Pa. at 505. (Emphasis added). (See also Jones Appeal, supra.)

An Orphans' Court case from Somerset County, Pennsylvania, has been cited with approval by the Pennsylvania Supreme Court in several decisions, (In re: Lutheran Children and Family Service of Eastern Pennsylvania, (Appeal of Diane B.), 321 A.2d 618, 456 Pa. 429 (1974); Matter of Kapcsos, supra.) This case of In re: Adoption of J.R.F., 27 Somerset L.J. 298 (1972), states as follows, inter alia:

"Parenthood is not...a mere biological status, or passive state of mind which claims and declines to relinquish ownership of the child. It is an active occupation calling for constant affirmative demonstration of parental love, protection and concern...(A parent) must exert himself to take and maintain a place of importance in the child's life, and must exercise reasonable firmness in declining to yield to obstacles. Otherwise, he cannot perform the job of parent, and the parent-child relationship will deteriorate as the absent parent more and more gives his thoughts, attentions, concern and priorities to his own life and associates."

(Emphasis added) In re: Adoption of J.R.F., 27 Somerset L.J. at 304-05. See also In re: Adoption of Orwick, 347 A.2d 677, 464 Pa. 549 (1975).

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